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No. 13284

United States
Court of Appeals
For the Ninth Circuit.

MUTUAL TELEPHONE COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Plaintiff, Mutual Telephone Company:

HEATON L. WRENN, ESQ.,
MARSHALL M. GOODSILL, ESQ.,

Bank of Hawaii Building,
Honolulu, T. H.

For the Defendant, United States of America:

HOWARD K. HODDICK, ESQ.,
Acting United States Attorney,

District of Hawaii,
Federal Building,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Mutual Telephone Company, a corporation organized under the laws of the Kingdom of Hawaii and existing under and by virtue of the laws of the Territory of Hawaii with its principal place of business in the City of Honolulu, said Territory, brings this suit against the United States of America, and complains and alleges:

I.

The grounds upon which the jurisdiction of this court depends are:

(1) This is a civil action by a Hawaiian corporation against the United States of America arising under the law providing for internal revenue, of which this court has jurisdiction, regardless of the sum involved, under Title 28, United States Code, Sections 1331, 1340 and 1346, as hereinafter more fully appears.

(2) Plaintiff has complied with the requirements of Section 3772(a)(1) and (2) of the Internal Revenue Code, regarding suits for recovery of any internal revenue tax, [3*] penalty or other sum, as hereinafter more fully appears.

II.

Plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942 with the Collector of Internal Revenue of the United States for the District of Hawaii. The Report of Examination by the Internal Revenue Agent in Charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income certain installation and supersedure charges hereinafter described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency, dated January 8, 1945, was received by plaintiff. The taxes in question were assessed and paid with interest thereon on February 2, 1945, to Fred H. Kanne, the then Collector of Internal Revenue of the United States for the District of Hawaii. Said Fred H. Kanne is now dead and is not in office as said Collector of Internal Revenue. Plaintiff filed duly executed claims for refund on December 6, 1946, for each of the calendar years 1941 and 1942 with the Collector of Internal Revenue of the

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

United States for the District of Hawaii. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, [4] 1947, in connection with such claims for refund proposed that the claims be disallowed. On June 1, 1948, plaintiff received a notice of disallowance in full of both of such claims for refund from the Commissioner of Internal Revenue, such notice being dated May 19, 1948.

III.

Plaintiff experienced a rapid rate of increase in the number of phones connected in the year 1941, due to increased construction resulting from defense activities and considered the increase in the plant investment resulting therefrom dangerous. The increased demand for service appeared to plaintiff to be temporary in nature and the expanded investment remaining on plaintiff's accounts after the demand for service diminished would require unduly large overhead charges at the later date, in proportion to income. Plaintiff proposed to increase charges for installation and supersedure in the hope that this would have a retarding effect on prospective installers.

IV.

Plaintiff's rates and charges must be fixed by Order of the Public Utilities Commission of the Territory of Hawaii. Such Commission considered plaintiff's proposal to increase installation and supersedure charges in its Decision No. 51, filed October 24, 1941, and expressed satisfaction with

the increased charges, provided they were not treated as income. The decision stated: [5]

> "The Company makes no showing that such an increase in revenue is required and we believe it improper to allow the increase to go through in a manner that would permit the increase to be passed on to the common stockholders in the form of increased dividends.
>
> * * *
>
> "The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an 'investment basis' would be a reduction from the net investment in arriving at a rate base. Investors would not require a return and subscribers would be spared paying a capital charge on same. On motion of the Commission, or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted."

Commission Order No. 379, dated October 1, 1941, entered pursuant to the above decision, directed the Company to make the increased charges and required accounting therefor as follows:

> "The amounts representing the increase in connection charges and charges for supersedure of service, over and above those which are now being charged by petitioner in the same respective categories, and the newly established charges for supersedure of service where no charge has been previously made, shall be charged to Account No. 175, Contributions to

Telephone Plant, the amounts so accruing to be segregated from other charges to said account."

V.

The additional charges described in Order No. 379 were put into effect by plaintiff as of October 2, 1941, and were continued in force until May 1, 1942, when they were terminated pursuant to Commission's Order No. 406, dated July 16, 1942, which provided for the accounting for the funds collected as follows:

"It is further ordered that the amount of moneys collected by Petitioner through the increased installation and supersedure charges, as authorized by Commissioner's Order [6] No. 379, shall be retained in Subaccount No. 175.2 'Contributions to Telephone Plant' and shall not be taken into the income account until such time as the Commission may authorize such action."

VI.

When the increased installation and supersedure charges were collected from a subscriber a portion thereof, representing the previously existing customary charge for such service, was placed in the income account and the balance was placed in a capital account entitled "Liability for Installation Charges." This account is the same account as Account 175 and Subaccount 175.2, "Contributions to Telephone Plant," specified in Commission's Orders Nos. 379 and 406. This capital account remained in existence, and the excess charges remained therein from 1941 through 1948, inclusive.

VII.

During 1948, the Public Utilities Commission made an investigation and held a hearing on Plaintiff's rates and charges. In its Decision No. 102, filed August 12, 1948, the Commission considered the cost of Plaintiff's pension plan, in particular Plaintiff's accrued liability, for pensions based on past services, and decided that the amount held in the account entitled "Contributions of Telephone Plant" should be transferred to the pension reserve to reduce the past service obligation. Commission Order No. 598, dated August 7, 1948, provided:

> "(4) That applicant transfer the amount of $41,970.50, presently carried in Account 175.2 'Contributions of Telephone Plant,' to its pension reserve [7] to reduce the accrued liability for past service."

This portion of the Order was suspended until final determination of the amount transferable, pursuant to the Commission's authorization, and the actual transfer to the pension reserve was made by plaintiff as of March 1, 1949.

VIII.

Plaintiff maintains its records on the accrual basis, filing its tax returns on that same basis for the calendar year. Plaintiff received money in the sum of $13,341.50 in the year 1941, and $28,673.00 in the year 1942, in excess charges as authorized by Order No. 379 of the Commission. Plaintiff fully complied with such Order and did not take

up these excess charges into its income account but credited them to a capital account. These charges under Commission Orders Nos. 379 and 406 could not be taken into plaintiff's income account. Plaintiff did not report these charges as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

Plaintiff's accounting method clearly and correctly reflects its income for the years 1941 and 1942.

X.

The sums received as such increased installation and supersedure charges are not includable in plaintiff's gross income for the years 1941 and 1942, or for any other year, under Sections 22(a), 41 and 42 of the Internal Revenue Code. The sums received were receipts of capital, not income. [8]

XI.

Even if the sums received as such increased installation and supersedure charges were in the nature of income they are not includable in plaintiff's gross income for the years 1941 and 1942, under Sections 22(a), 41 and 42 of the Internal Revenue Code, because they were received subject to specific limitations and conditions which deprived plaintiff of unfettered control over their disposition.

XII.

The Commissioner of Internal Revenue acted erroneously and illegally and without authority in

including the above-mentioned sums in computing plaintiff's gross income for the years 1941 and 1942, and in determining that plaintiff's method of accounting did not clearly reflect its income, which resulted in the erroneous and illegal assessment and collection of additional taxes for the years 1941 and 1942, amounting to a total of $34,055.38 in excess of the correct amounts due for such years, together with interest charges thereon of $4,378.85.

XIII.

Defendant, through its Collector aforesaid, erroneously and illegally and without authority of law over-assessed and collected the sum of about $34,055.38 for the years 1941 and 1942, with interest thereon amounting to $4,378.85; this being in addition to all other income, declared value excess profits tax and excess profits tax for the years involved.

XIV.

No amount has been paid to Plaintiff on account of said [9] sum of $34,055.38 and interest charges thereon of $4,378.85 erroneously and illegally assessed and collected by defendant from plaintiff.

XV.

Plaintiff is justly entitled to recover from defendant the said sum of $34,055.38, plus interest thereon amounting to $4,378.85, plus interest on the total amount as provided by law. Plaintiff has observed and performed the provisions and requirements of the laws of the United States and the rules and regulations prescribed by the Commis-

sioner of Internal Revenue and approved by the Secretary of the Treasury of the United States, and all other matters and things necessary to be observed and performed on its part to entitle it to recovery of said sums.

Wherefore, plaintiff prays judgment against defendant, upon the facts and law, in the sum of $38,434.23, together with interest as in such cases is provided by law and the costs of this suit, and that process issue out of this court requiring defendant to appear and answer this complaint.

Dated at Honolulu, T. H., this 19th day of August, 1949.

/s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

Of Counsel:

ANDERSON, WRENN & JENKS.

Duly verified.

[Endorsed]: Filed August 19, 1949. [10]

[Title of District Court and Cause.]

SECOND AMENDMENT OF COMPLAINT

Now comes plaintiff herein, Mutual Telephone Company, by its attorneys, and, in accordance with Rule 15(a) of the Federal Rules of Civil Procedure, does hereby amend its Complaint filed herein on August 19, 1949, as amended by Amendment, dated

January 28, 1951, by striking out Paragraphs X through XV, inclusive, and the "Wherefore" paragraph of the Complaint as so amended and inserting in lieu thereof the following:

X.

The sums received by plaintiff as such increased installation and supersedure charges are not includable in plaintiff's gross income for the years 1941 and 1942, or in any other year because they do not constitute "income" within the meaning of the Sixteenth Amendment. [13]

XI.

Even if the sums received by plaintiff as such increased installation and supersedure charges become "income" in a subsequent year, such sums are not includable in plaintiff's gross income for the years 1941 and 1942, because they were received and held as capital accretions at that time.

XII.

Even if the sums received by plaintiff as such increased installation and supersedure charges must be considered as receipts of income rather than as receipts of capital, such sums are not includable in plaintiff's gross income for the years 1941 and 1942, because they were received and held subject to specific restrictions and conditions which deprived plaintiff of unfettered control over their disposition.

XIII.

The Commissioner of Internal Revenue acted er-

roneously and illegally and without authority in including the above-mentioned sums in computing plaintiff's gross income for the years 1941 and 1942, and in determining that plaintiff's method of accounting did not clearly reflect its income, which resulted in the erroneous and illegal assessment and collection of additional taxes for the years 1941 and 1942, amounting to a total of $32,522.51 in excess of the correct amounts due for such years, together with interest charges thereon of $4,205.88, [14] or a total of $36,728.39.

XIV.

Defendant, through its Collector aforesaid, erroneously and illegally and without authority of law over-assessed and collected the said sum of $32,522.51 for the years 1941 and 1942, with interest thereon amounting to $4,205.88; this being in addition to all other income, declared value excess profits tax and excess profits tax for the years involved.

XV.

No amount has been paid to plaintiff on account of said total amount of $36,728.39 erroneously and illegally assessed and collected by defendant from plaintiff.

XVI.

Plaintiff is justly entitled to recover from defendant the said sum of $36,728.39, plus interest thereon as provided by law. Plaintiff has observed and performed the provisions and requirements of the laws of the United States and the rules and regulations prescribed by the Commissioner of Internal Revenue and approved by the Secretary of

the Treasury of the United States, and all other matters and things necessary to be observed and performed on its part to entitle it to recovery of said sums.

Wherefore, plaintiff prays judgment against [15] defendant upon the facts and law, in the sum of $36,728.39, together with interest as in such cases is provided by law and the costs of this suit, and that process issue out of this court requiring defendant to appear and answer this complaint.

Dated at Honolulu, T. H., this 8th day of March, 1951.

/s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff. [16]

Defendant herein by its attorney consents to the filing of the foregoing Amendment to the Complaint of plaintiff, filed August 19, 1949, as amended by Amendment, dated January 28, 1951.

/s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant.

Leave to file the foregoing Amendment to the Complaint of plaintiff, filed August 19, 1949, as amended by Amendment, dated January 28, 1951, is hereby granted.

/s/ J. FRANK McLAUGHLIN,
Judge of the United States District Court for the District of Hawaii.

[Endorsed]: March 9, 1951. [17]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, Defendant above named, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and for an answer to the Complaint, filed herein on August 19, 1949, as amended by Amendment, filed January 31, 1951, and as further amended by Second Amendment, filed March 9, 1951, alleges as follows:

I.

The allegations contained in Paragraph I of the Complaint are admitted.

II.

The allegations contained in Paragraph II of the Complaint are admitted.

III.

The Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III of the Complaint.

IV.

The allegations contained in Paragraph IV of the Complaint are denied, except it is admitted that the Public Utilities Commission of the Territory of Hawaii entered Decision No. 51 on [19] October 24, 1941, and entered Commission Order No. 379 under date of October 1, 1941, and that the Com-

mission's Decision No. 51 and Order No. 379 are in part as set forth in Paragraph IV of the Complaint.

V.

The allegations contained in Paragraph V of the Complaint are admitted.

VI.

The allegations contained in Paragraph VI of the Complaint are denied, except it is admitted that the increased installation and supersedure charges collected from the subscribers pursuant to the Commission's Decision No. 51 and Order No. 379 were entered in an account entitled "Liability for Installation Charges."

VII.

The allegations contained in Paragraph VII of the Complaint are admitted.

VIII.

The allegations contained in Paragraph VIII of the Complaint are denied, except it is admitted that Plaintiff maintains its records on the accrual basis, filing its tax returns on that same basis for the calendar year; that Plaintiff received money in the sum of $13,341.50 in the year 1941, and $28,673.00 in the year 1942, in charges as authorized by Order No. 379 of the Commission; and that Plaintiff did not report these charges as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

The allegations contained in Paragraph IX of the Complaint are denied.

X.

The allegations contained in Paragraph X of the Complaint, as amended, are denied. [20]

XI.

The allegations contained in Paragraph XI of the Complaint, as amended, are denied.

XII.

The allegations contained in Paragraph XII of the Complaint, as amended, are denied.

XIII.

The allegations contained in Paragraph XIII of the Complaint, as amended, are denied.

XIV.

The allegations contained in Paragraph XIV of the Complaint, as amended, are denied.

XV.

The allegations contained in Paragraph XV of the Complaint, as amended, are denied, except it is admitted that no amount has been paid to the Plaintiff on account of said sum of $32,522.51 and interest charges thereon of $4,205.88.

XVI.

The allegations contained in Paragraph XVI of the Complaint, as amended, are denied.

Wherefore, Defendant prays for the dismissal of the Complaint filed herein and for its costs and disbursements in this action.

Dated Honolulu, T. H., this 16th day of March, 1951.

/s/ HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 16, 1951. [21]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that the following statements of fact shall be considered as true and in evidence. It is also agreed by and between the parties hereto that they may also offer any other evidence, oral, documentary or otherwise, in the trial of this case, provided such additional evidence shall not vary or in any way contradict or conflict with the facts herein stipulated to be taken as true, and provided, further, that such additional evidence is properly admissible.

I.

Plaintiff, Mutual Telephone Company, is a corporation organized under the laws of the Kingdom of Hawaii and existing under the laws of the Territory of Hawaii. Plaintiff is a public utility whose principal business consists of furnishing wire telephone service in the Hawaiian Islands. Plaintiff is and has been at all times material to this case a public utility subject to the jurisdiction of the Public Utilities Commission [23] of the Territory of Hawaii under Chapter 82, Revised Laws of Hawaii, 1945, as amended, and its rates, fares, charges, classifications, rules, and practices, and its form and method of keeping accounts, books and records, and its accounting system and its financial transactions are subject to the regulation of the Public Utilities Commission.

II.

On September 10, 1941, plaintiff filed a petition with the Public Utilities Commission of the Territory of Hawaii, which was assigned Docket No. 764, in which plaintiff requested the said Public Utilities Commission to authorize certain increases in its installation tariffs and to authorize establishment of new supersedure tariffs for the purpose of diminishing the demand for new telephone service in the City of Honolulu. A true copy of that petition is attached hereto and made a part hereof and designated as Exhibit "A." Installation charges (also known as connection charges) are of two types—service connection charges and recon-

nection charges. A service connection charge is a charge customarily made by plaintiff for connecting each telephone instrument newly placed in a subscriber's premises. A reconnection charge is a charge customarily made by plaintiff for reconnecting a dead instrument already in place in a subscriber's premises. A supersedure charge is a charge not theretofore made by plaintiff for substituting a new subscriber for a prior subscriber at the same premises where the telephone instrument is not dead and is not reconnected.

III.

After a hearing on the above petition the Public Utilities Commission issued its Decision No. 51 and its Order No. 379 [24] which were filed October 24, 1941. In Decision No. 51 the Public Utilities Commission approved the request of the plaintiff and in its Order No. 379 it made the requested increases in the installation and supersedure tariffs. In Decision No. 51 the Public Utilities Commission found that while plaintiff did not contend that the additional income was required, it did contend that the additional charges were required for the retarding effect; that plaintiff had made no showing that an increase in revenue was required and that the Commission believed that it was improper to allow the increase to go through in a manner which would permit it to be passed on to the common stockholders in the form of increased dividends; that the increase would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates would be a reduction from the net

investment in arriving at a rate base and that investors would not require a return and subscribers would be spared paying a capital charge on the same; that on motion of the Commission or other application of plaintiff other disposition of the accrued balance might be made as conditions warranted; and that in the opinion of the Commission the increased charges should be but temporary. In Order No. 379 the Commission directed that the increased installation and the new supersedure charges should be charged to Account No. 175, Contributions to Telephone Plant, and the amounts so accruing should be segregated from the other charges in said account. A true copy of Decision No. 51 and Order No. 379 is attached hereto, made a part hereof and designated as Exhibit "B."

IV.

The increased installation and new supersedure charges provided for in Decision No. 51 and Order No. 379 were put into [25] effect by the plaintiff as of October 2, 1941. On April 22, 1942, the plaintiff filed with the Public Utilities Commission a petition in which it requested a termination of the additional charges. The U. S. Army Signal Corps had established a system of priorities for telephone allocations and consequently the plaintiff considered the additional charges no longer necessary. A true copy of the plaintiff's petition of April 22, 1942, is attached hereto, made a part hereof and designated as Exhibit "C."

V.

Pursuant to the filing of the aforesaid petition the Public Utilities Commission by Decision No. 57 and Order No. 406, filed on July 18, 1942, terminated the increased and newly established charges as of May 1, 1942. In its decision and order the Public Utilities Commission directed that the additional charges collected by the plaintiff pursuant to Decision No. 51 and Order No. 379 were to be held in Account No. 175 until the Public Utilities Commission should determine their final disposition. A true copy of Decision No. 57 and Order No. 406 is attached hereto, made a part hereof and designated as Exhibit "D."

VI.

For many years plaintiff has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by the Federal Communications Commission, which system was prescribed for plaintiff by Order No. 284 of the Public Utilities Commission, dated December 9, 1937, effective January 1, 1938. Account No. 175, "Contributions of Telephone Plant" is one of the accounts provided for in said Uniform [26] System of Accounts. A true copy of portions of said Uniform System of Accounts, in effect in 1941 and 1942, relating to Account No. 175, including the list of all balance sheet accounts, Instruction 20B relating to the plant asset accounts, and Instruction 175 relating to Account No. 175, is attached hereto, made a part hereof and designated as Exhibit "E."

In accordance with said Uniform System of Accounts plaintiff credited to Account 175 contributions by its subscribers for line extensions. Such contributions by subscribers for line extensions have never been reported by plaintiff as income for Federal income tax purposes and have never been taxed as income.

In 1945, the Federal Communications Commission amended said Uniform System of Accounts by eliminating Account No. 175 and instructing that the amounts held in such account be deducted from the appropriate plant asset accounts. Plaintiff in 1945, complied with these instructions with respect to the amounts in Account No. 175 which represented contributions for line extensions. However, Subaccount 175.2, referred to below, was retained intact because of said Order No. 406 of the Public Utilities Commission.

The increased installation and new supersedure charges were collected by plaintiff from subscribers from October 2, 1941, to May 1, 1942. Pursuant to said Order No. 379 of the Public Utilities Commission plaintiff credited amounts equal to its collections of the increased installation and new supersedure charges to a new Subaccount No. 175.2 entitled "Liability for Installation Charges." This new subaccount was started by plaintiff and maintained as a subaccount under the general Account No. 175, "Contributions of Telephone Plant" in order that the amounts in Subaccount 175.2 could be segregated from [27] the other amounts credited to Account No. 175 in accordance with the Commission's order.

The defendant does not concede or admit that the sums received by plaintiff from subscribers on account of the increased installation and new supersedure charges which were credited to Subaccount 175.2 were or are liabilities of the plaintiff.

In 1941, plaintiff received $13,341.50 on account of said increased and newly established installation and supersedure charges, and in 1942, plaintiff received $28,673 on account of said increased and newly established installation and supersedure charges. This total of $42,014.50 was adjusted to $41,970.50 in February, 1944, to correct an accounting error of $44.00 which was detected in reconciling the accounts.

VII.

Subaccount No. 175.2 was credited with all the increased installation and new supersedure charges collected by the plaintiff pursuant to the Public Utilities Commission Decision No. 51 and Order No. 379. These additional charges were not billed to the customer as such. The subscriber was billed in one sum for the total of his installation or supersedure charge. It was recorded on the bill as "Other Charges" and was explained by a supplemental statement sent out with the bill. This statement was entitled "Statement of Other Charges and Credits" and had several items listed on it. One of these items was "Service Connection Charge" and the installation or supersedure charge in one amount was recorded opposite this item. Although the billings to subscribers did not show the amount

of the increased installation charges separately from previously existing installation charges and did not show the newly established supersedure charges separately, plaintiff maintained its accounting records, as it was required to do by the order of the Public Utilities Commission, so as to reflect the amount of the increased [28] installation charges separately from the previously existing installation charges and so as to reflect the newly established supersedure charges separately from previously existing charges. The additional charges were all credited to Subaccount 175.2, "Liability for Installation Charges" and plaintiff maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could have been refunded to the individual customers if this were ever required.

The total cost to plaintiff of making new service connections exceeded the revenue from the tariffs charged therefor (even including the additional new connection charges authorized by the Public Utilities Commission Order No. 379). The cost of materials (including telephone instruments, switches, wiring and cables) and the cost of field labor required to make the installation were in the case of each new service connection capitalized by setting up such costs in plaintiff's plant asset account. These costs remain in the plant asset account until the instrument is removed and at the time of removal are charged to operations. Administration and office expenses in the case of new service con-

nections were charged off as expenses of operations in the year in which they were incurred. The total estimated cost of each new service connection was $13.92 during this period. The cost of materials and field labor which was capitalized as aforesaid was approximately 85 per cent of such total cost and the cost of administration and office expenses which was *expense* as aforesaid was approximately 15 per cent of such total cost.

The revenue from the tariffs charged for reconnections and supersedures under Public Utilities Commission Order No. 379 exceeded the total cost to plaintiff of making such reconnections [29] and supersedures. The costs of reconnection and the costs of supersedure were entirely charged off as expense of operations in the year incurred.

Additional revenue received by plaintiff on account of the increased installation and new supersedure charges established by Public Utilities Commission Order No. 379 was $41,970.50. Approximately 60.55 per cent of such total additional revenue was received on account of the additional service connection charges, 21.35 per cent on account of the additional reconnection charges and 18.10 per cent on account of the new supersedure charges.

With the exception of billing and the accounting necessary to keep the additional charges segregated from other charges, plaintiff was not required to and did not do any additional work or perform any additional services in order to receive the increased installation charges and the new supersedure

charges; that is, it did exactly the same work for subscribers in making connections and supersedures as it had done before the new charges were established and as it did after they were terminated.

Although Subaccount 175.2 was credited with the additional charges as they were collected and plaintiff's general cash account was debited, the moneys collected by virtue of the additional charges were intermingled with other moneys in the general treasury of plaintiff and were used by plaintiff without regard to their source. Plaintiff at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and new supersedure charges. [30]

VIII.

Plaintiff maintains its records on the accrual basis, and files its tax returns on the accrual basis for the calendar year. Plaintiff did not report the aforesaid increased and newly established installation and supersedure charges received in 1941 and 1942, as part of its gross income in its tax returns for the years 1941 and 1942.

IX.

Plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942, with the Collector of Internal Revenue of the United States for the District of Hawaii. The Report of Examination by the Internal Revenue

Agent in Charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income the increased installation charges and the new supersedure charges hereinabove described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency, dated January 8, 1945, was received by plaintiff. The deficiencies determined by the Commissioner on account of failure to include said charges in gross income were:

1941	Income Tax Liability		$ 1,978.47
	Excess Profits Tax Liability		6,959.35
1942	Declared Value Excess Profits Tax Liability		1,892.43
	Excess Profits Tax	$24,102.51	
	Less: 10% post war credit	2,410.25	21,692.26
Interest			4,205.88
	Total		$36,728.39

Said additional taxes and interest in the total amount of $36,728.39 for both years, were assessed and were paid by plaintiff on February 2, 1945, to Fred H. Kanne, the then Collector of Internal Revenue for the District of Hawaii. The payment of these taxes and interest were not charged to Account No. 175.2. Said Fred H. Kanne is now dead and is not in office as said Collector of Inter-

nal Revenue. Plaintiff filed duly executed claims for refund on December 6, 1946, for each of the calendar years 1941 and 1942, with the Collector of Internal Revenue of the United States for the District of Hawaii. The claim for refund for 1941 was for the total sum of $10,482.57 plus interest thereon as allowed by law, and the claim for refund for 1942 was for the total sum of $27,951.66 plus interest thereon as allowed by law. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, 1947, in connection with such claims for refund proposed that the claims be disallowed. On June 1, 1948, plaintiff received a notice of disallowance in full of both of such claims for refund from the Commissioner of Internal Revenue, such notice being dated May 19, 1948.

X.

During 1948, the Public Utilities Commission, following an application by the plaintiff for an increase in rates, made an investigation of and held a hearing on the plaintiff's rates and charges. A true copy of pages 6-28 and 6-29 of the plaintiff's application for a rate increase are attached hereto and made a part hereof and described as Exhibit "F." This portion of the application relates to the liability of the plaintiff for contributions to the Retirement System of Mutual Telephone [32] Company.

In 1931, plaintiff's Board of Directors established a jointly contributory retirement system to be

known as the "Retirement System of Mutual Telephone Company" to be operated under a board of managers consisting of the president of plaintiff and four other persons appointed by plaintiff's Board of Directors. The Retirement System is a separate entity from plaintiff and maintains its own books and accounts. Plaintiff does not have in its own accounts a "pension reserve" as such. Plaintiff reserved the right to discontinue or to reduce at any time its contributions to the Retirement System. An employee who took the necessary steps provided for in the Rules and Regulations of the Retirement System was credited with years of service put in prior to the establishment of the Retirement System and was issued a certificate (a true sample copy of which is attached hereto, made a part hereof and designated as Exhibit "G") stating that he was entitled to all the rights and privileges provided for by the Rules and Regulations of the Retirement System and that he was entitled to prior service credit of so many years, months and days in full for all service rendered prior to the 1st day of July, 1931. A true copy of the Rules and Regulations of the Retirement System of Mutual Telephone Company is attached hereto, made a part hereof and designated as Exhibit "H."

Although plaintiff did not suggest or request to the Commission at the time of the 1948 hearing that any action be taken with respect to Subaccount 175.2, the Commission on its own initiative in its Decision No. 102 considered the cost to plaintiff of the Retirement System and in Order No. 598 di-

rected that plaintiff "transfer the amount of $41, 970.50 [33] presently carried in Account 175.2, 'Contribution of Telephone Plant,' to its pension reserve to reduce the accrued liability for past service." "A true copy of portions of pages 6 and 7 of said Decision No. 102, relating to the transfer of the amount in Account No. 175 to the 'pension reserve,' and a true copy of said Order No. 598 is attached hereto, made a part hereof and designated as Exhibit I."

On December 3, 1948, the plaintiff addressed a letter to the Public Utilities Commission outlining the tax difficulties which had arisen in connection with the additional charges which had been credited to Subaccount No. 175.2. A true copy of the letter is attached hereto, made a part hereof and designated as Exhibit "J." The plaintiff in that letter requested that the Commission suspend paragraph 4 of Order No. 598 providing for the transfer of the funds from Subaccount No. 175.2 to plaintiff's "pension reserve" until a final determination of the amount transferable. On December 22, 1948, the Public Utilities Commission replied that this matter should be held in abeyance by the plaintiff pending formal approval by the Commission. On February 24, 1949, the Commission advised the plaintiff that at its meeting held January 27, 1949, it had denied plaintiff's request to suspend transfer to the "pension reserve" of the funds credited to Subaccount No. 175.2. On March 1, 1949, plaintiff deposited $41,970.50 in cash to the account of the Retirement System of Mutual Telephone Company in Bank of

Hawaii and deleted Subaccount No. 175.2, and on March 8, 1949 plaintiff advised the Public Utilities Commission of this action. [34]

Dated Honolulu, T. H., this 26th day of March, 1951.

MUTUAL TELEPHONE COMPANY,
Plaintiff,

By /s/ HEATON L. WRENN,
/s/ MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Defendant,

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant. [35]

EXHIBIT A

Before the Public Utilities Commission
of the Territory of Hawaii

Docket No. 764

In the Matter of

THE PETITION OF MUTUAL TELEPHONE COMPANY

PETITION

To the Honorable Public Utilities Commission of the Territory of Hawaii:

The petition of Mutual Telephone Company, here-

inafter referred to as petitioner, respectfully shows unto this Honorable Commission as follows:

I.

That petitioner, whose principal office is located at 1126 Alakea Street, Honolulu, Hawaii, is a corporation duly incorporated under the laws of the Kingdom of Hawaii, on or about August 16, 1883. That petitioner is now existing under and by virtue of the laws of the Territory of Hawaii, and is a regularly authorized public utility furnishing telephone service on the Islands of Hawaii, Maui, Molokai, Oahu and Kauai, Territory of Hawaii, and radio telephone service between said Islands as well as radio telephone service to the toll, radio telephone and connecting systems of the American Telephone & Telegraph Company of the United States and foreign countries and ships at sea, and also wireless telegraph service between the Islands of Oahu, Hawaii, Maui, Molokai, Lanai and Kauai. [41]

II.

That the presently effective classification of rates, tolls and charges of petitioner, and petitioner's presently effective rules and regulations affecting rates and service and information relating thereto, as far as its entire public business is concerned, are on file with the Public Utilities Commission of the Territory of Hawaii.

III.

That the present demands for service of petitioner are far in excess of the demand at any time

during the past history of petitioner. This increase is indicated by an increase in telephones of 3,783 in the Honolulu Exchange area for the first six months of 1941, as compared with a normal increase of 1,328 telephones for the first six months of 1940. The total station gain of petitioner for the month of July was 793 and that for the month of August was approximately 700, indicating that the abnormal rate of gain is steadily increasing and that the growing burden on petitioner's facilities is rapidly becoming acute. This unusual increase in service requirements has placed such a demand on central office facilities, as well as on the distribution plant, that service being rendered at the present time is not satisfactory. New equipment has been ordered and plans have been proposed to relieve this situation satisfactorily. This equipment will be sufficient to take care of anticipated increased demand for the balance of the year 1941. New equipment has already been ordered but not yet delivered and should be sufficient to take care of anticipated increased demand for service [42] at the present rate of increase for the first quarter of 1942. Recent advices from the manufacturers and suppliers of cable and equipment necessary for the expansion of petitioner's plant to meet this growth are to the effect that priorities on essential materials are becoming more stringent, and that longer delays in delivery are to be expected. The point has been reached where practically no commitments on delivery can be made unless orders are accompanied by a preference rating. If the present rate of gain

is maintained and deliveries cannot be improved, it must be expected that the time is not far off when the demand cannot be met, and application for telephone service must be refused. Army and Navy officials have expressed themselves as recognizing the importance to national defense of maintaining adequate telephone communications in the Territory and are helpful in procuring preference ratings on essential equipment, but they have also indicated their interest in efforts to prevent abnormal expansion, due to the need for vital raw materials in other defense efforts.

IV.

That it is the considered opinion of petitioner, in spite of any change in world conditions, short of actual warfare in the Territory of Hawaii, that demands on the system of petitioner in the Honolulu Exchange area will continue to increase and will be such for the next two or three years that increase in petitioner's plant will be required. It is the opinion of petitioner that when the present defense activities slacken in the next several years, and if petitioner in the meantime has continued to increase installation of central [43] office equipment and outside plant, that petitioner will have idle plant on hand when the defense program slackens.

V.

Petitioner believe it to be in the public interest that it as a public utility meet the demands for service which are made upon it but it also believes that for the protection of the normal subscribing public

and for the protection of its stockholders that definite action should be taken by it to meet the exigencies of the situation.

Petitioner is of the opinion that the increased demand on its facilities can be best met in the public interest by the Commission's—

(1) authorizing the increase of certain service connection charges;

(2) authorizing the increase and establishment of certain charges for supersedure of service; and

(3) authorizing and directing that the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective catagories now in effect be kept in a separate account, the disposition of which may be determined at a later date.

VI.

If petitioner increases its plant facilities on the Island of Oahu to meet the present demand for service at the present rate, it will require a capital outlay during 1942 alone of $1,575,488, while if the present rate of growth drops 50 per cent, the estimated capital outlay required to increase plant facilities for such growth during 1942 will be [44] $1,275,716; that should the present rate of growth continue beyond 1942, it is believed that the capital outlay over and above that required for normal growth would be even greater in proportion than in 1942. That filed herewith are the following exhibits:

Exhibit 1

Preliminary provisional estimate for 1942 of petitioner showing estimated construction and maintenance expenditures for that year;

Exhibit 2

Preliminary provisional estimate for 1942 of petitioner showing estimated construction and maintenance expenditures for that year if present rate of growth drops 50 per cent beginning August 1, 1941.

VII.

Petitioner recommends that the following service connection charges contained on Schedule B-1 for all Exchanges be amended, effective as soon as practicable in so far as such charges apply to Zones 1 and 2 of the Honolulu Exchange area as follows:

(a) That the connecting charge for an individual primary business station be increased from $3.50 to $15.00;

(b) That the connecting charge for a primary party business station be increased from $3.50 to $10.00;

(c) That the connecting charge for residence primary individual station be increased from $3.50 to $10.00;

(d) That the connecting charge for residence primary party line station be increased from $3.50 to $7.50;

(e) That the connecting charge for a private branch exchange trunk line be increased from $3.50 to $15.00;

(f) That the connecting charge for a private branch exchange primary station be increased from $3.50 to $10.00; [45]

(g) That the charge for establishment of service by the use of instrumentalities already in place upon the subscriber's premises, and where no change is made in the type or location of those instrumentalities, be increased from a non-classified flat charge of $1.50 to the following classified charges:

1. Business primary line.....$10.00
2. Residence primary individual line... 7.50
3. Residence primary party line..... 5.00

(h) That the following charges for supersedure be fixed:

1. Business primary station.....$ 5.00
2. Residence primary station..... 3.50

VIII.

Petitioner is of the opinion that the increase in installation charges will unquestionably retard the increased demand on its services to an extent which it is impossible to accurately forecast. Filed herewith are the following exhibits:

Exhibit 3

Exchange Service Schedule B-1 as proposed to be amended so as to pertain to service connection charges for all exchanges except Honolulu;

Exhibit 4

Exchange Service Schedule B-1-A pertaining to

service connection charges for Zones 1 and 2 in the Honolulu Exchange area.

Wherefore petitioner prays that a hearing may be had upon this petition and that upon a hearing thereof petitioner be authorized and directed to make the service charges herein requested and that petitioner be authorized and directed to purchase such additional equipment as may be necessary in order to meet the growing demand for service in Honolulu and that [4] petitioner be authorized and directed to keep the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective categories now in effect, in a separate account, the disposition of which may be determined at a later date.

Dated at Honolulu, Hawaii, this 10th day of September, 1941.

MUTUAL TELEPHONE COMPANY,

By /s/ ALVAH A. SCOTT,
Its President,

By /s/ W. C. AVERY,
Its Treasurer. [47]

Territory of Hawaii,
City and County of Honolulu—ss.

Alvah A. Scott, being first duly sworn, on oath deposes and says: That he is President of Mutual Telephone Company, the within named petitioner; that he makes this verification for and on behalf of

said petitioner and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and the same are true.

/s/ ALVAH A. SCOTT.

Subscribed and sworn to before me this 10th day of Sept., 1941.

/s/ GEORGE B. PALMER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires June 30, 1945. [48]

EXHIBIT B

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 764

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for an Increase in Certain Service Connection Charges; for an Increase and Establishment of Supersedure Charges; for Approval of Certain Capital Expenditures; and for Authority to Keep Additional Revenues From Increased Charges in a Separate Account.

Decision No. 51

Before: V. B. Libbey, Chairman;
A. H. Rice, Commissioner;
F. G. Manary, Commissioner;
W. L. S. Williams, Commissioner;
L. L. PATTERSON, Commissioner.

DECISION

The Mutual Telephone Company filed its petition with the Commission on July 19, 1941, requesting authorization for the following:

"(1) authorizing the increase of certain service connection charges;

"(2) authorizing the increase and establishment of certain charges for supersedure of service; and

"(3) authorizing and directing the petitioner to meet the increased demands that are being made for its service and providing that all equipment purchased to meet such demands be included in its rate base, even though when the demand slackens a portion of such additional equipment may become idle for an appreciable period of time."

At date of August 6, 1941, a public hearing was held. Testimony was adduced and exhibits presented both by the Company's and the Commission's witnesses.

At date of September 10, 1941, the Company filed a discontinuance of the above described petition, and in lieu thereof a new petition was filed requesting a public hearing be held and that petitioner be authorized to establish new "connection" and "supersedure" charges in Zones 1 and 2 of the Honolulu Exchange area only, the proposed increased charges being as follows:

"(a) That the connecting charge for an individual primary business station be increased from $3.50 to $15.00;

"(b) That the connecting charge for a primary party business station be increased from $3.50 to $10.00;

"(c) That the connecting charge for residence primary individual station be increased from $3.50 to $10.00;

"(d) That the connecting charge for residence primary party line station be increased from $3.50 to $7.50; [51]

"(e) That the connecting charge for a private branch exchange trunk line be increased from $3.50 to $15.00;

"(f) That the connecting charge for a private branch exchange primary station be increased from $3.50 to $10.00;

"(g) That the charge for establishment of service by the use of instrumentalities already in place upon the subscriber's premises, and where no change is made in the type or location of those instrumentalities, be increased from a non-classified flat charge of $1.50 to the following classified charges;

"1. Business primary line.....$10.00
"2. Residence primary individual line. 7.50
"3. Residence primary party line..... 5.00

"(h) That the following charges for 'supersedure' be fixed:

"1. Business primary station.....$ 5.00
"2. Residence primary station..... 3.50"

In addition thereto the Company also requests that it "be authorized and directed to purchase such

additional equipment as may be necessary in order to meet the growing demand for service in Honolulu, and that petitioner be authorized and directed to keep the revenue from the new service and connection charges, over and above the amounts which would have been realized from the charges in the same respective categories now in effect, in a separate account, the disposition of which may be determined at a later date."

A public hearing was held on the latter petition at date of September 18, 1941. Testimony and evidence was presented by Company representatives and the staff of the Commission. It appears from the record that an extraordinary increase in telephone installations and capital outlay for fixed property for the current period on the Island of Oahu is required.

From the record of the hearing and the records of the Commission the following information relating to operations on the Island of Oahu has been compiled:

Date	Connected Phones	Book Cost of Fixed Property in Service	Depreciation Reserve	Book Cost Less Depreciation Reserve
12/31/38	23,881	$6,212,137	$1,987,333	$4,224,804
12/31/39	27,053	6,810,553	1,969,587	4,840,966
12/31/40	30,757	7,511,776	2,018,614	6,493,162
6/30/41	34,001	8,239,396	2,077,761	6,161,635

The average monthly net increase in phones connected may be computed to be:

1939 264
1940 309
1941 (6 mos.) 630

Net property additions in 1939 and 1940 were $616,162 and $652,196, respectively. In 1941 and 1942 the estimates are $1,592,715 and 1,231,460. [52]

Net Investment, Total Revenue and Income figures are shown below:

Year Ending	Net Investment Av. for Year	Total Revenue	Income Available for Return	Rate of Return on Net Investment
12/31/39	$4,532,885	$1,548,356	$363,056	8.0%
12/31/40	5,167,064	1,768,199	411,235	8.0
12/31/41	6,289,519*	2,092,538*	455,369*	7.2*

* Estimated.

A rapid rate of increase in number of connected phones and in investment to render the service is shown.

The company witnesses attributed the over and above normal increase to defense activity. In this we feel they are correct. The presence of the fleet, the heavy construction program, etc., which has resulted in increased business, an abnormal increase in population and increased family incomes have naturally created an increased demand for tlephone service.

The Company witnesses expressed the fear that this demand was of a temporary nature and that

as the defense activity slackened the Company would be left with a considerable amount of property not used and useful in rendering communication service for the community. We believe that their fears in this respect are well founded.

With a book cost of $8,239,396 and 34,001 phones in service in Oahu as of June 30, 1941, it appears that each connected phone represents a total investment of $242.33. On an average life of all property of 23 years on a six per cent Rate of Return and six per cent Sinking Fund Curve Depreciation basis, this represents an annual cost for Capital and Depreciation of $19.96.

On an "investment basis" for computing rates, this would involve an annual charge in rates of approximately this amount for each phone that may become idle as defense activity slackens. The investor faces an equivalent defficiency in return if the property is not allowed as used and useful. The proposed increased charges are estimated to increase annual revenue by approximately $78,000.00 per year if the present rate of increase in connections continues.

The Company makes no showing that such an increase in revenue is required, and we believe it improper to allow the increase to go through in a manner that would permit the increase to be passed on to the common stockholders in the form of increased dividends.

The Company witnesses felt that the income would not increase to this extent owing to the re-

tarding effect that the increased charges would have on prospective new installations. While they did not contend that additional income was required they did contend that the additional charges were required for the retarding effect.

The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an "investment basis" would be a reduction from the net investment in arriving at a rate base. Investors would not require a return and subscribers would be spared paying a capital charge on same. On motion of the Commission or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted.

We feel that the Company may properly submit for approval rules providing [53] additional charges for various classes of service to be handled in the same manner.

The Commission in approving the increase and establishment of said charges, does not intend that such approval is to be construed as a finding of reasonableness of such charges or practices and is of the opinion that said charges should be but temporary, and that withdrawal of such approval should be made at such time as the Commission deemed appropriate.

Whether or not it is the Company's obligation to meet the current extraordinary demand for service is a very far-reaching question that we have not considered.

An Order conforming to the above Decision will issue.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 1st day of October, 1941.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ F. G. MANARY,
Commissioner,

By /s/ L. L. PATTERSON,
Commissioner,

By /s/ W. L. S. WILLIAMS,
Commissioner.

Attest:

I, J. R. Kenny, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby verify that the foregoing Decision No. 51 is a full, true and complete copy of original on file in the office of the Commission.

[Seal] /s/ J. R. KENNY,
Secretary. [54]

Before the Public Utilities Commission
of the Territory of Hawaii

Docket No. 764

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for an Increase in Certain Service Connection Charges; for an Increase and Establishment of Supersedure Charges; for Authority to Keep Additional Revenues From Increased Charges in a Separate Account; and for Amendment of Rule No. 15.

ORDER No. 379

A Decision in the above-entitled matter having been rendered, it is

Ordered, that the Petitioner is hereby authorized to place in effect as of October 1, 1941, the following service connection and supersedure charges, viz.:

Exchange Service Schedule No. B-1

Service Connection Charges	All Exchanges Except Honolulu

Service Connection Charges applicable to all exchange service facilities furnished within the Exchange Area of all exchanges except Honolulu.

(A) The charge for each of the following listed units of facilities upon application for installation shall be:

(1) Individual or party line service:

Each business primary line station	$ 3.50
Each residence primary line station	3.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line	3.50
Each primary station	3.50
Each extension station	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type or location of those instrumentalities 1.50

(1) This charge does not apply in the case of a supersedure.

(C) If at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service as classified in paragraph (A).

The application of the above service connection charges with exceptions, is covered in Rule and Regulation No. 15. [55]

Exchange Service Schedule No. B-1a

Service Connection Charges Honolulu Exchange

Service Connection Charges applicable to all exchange service facilities furnished with the Honolulu exchange area:

(A) The charge for each of the following listed

units of facilities upon application for new installation shall be:

(1) Individual or party line service:

Each business primary individual station	$15.00
Each business primary party line station	10.00
Each residence primary individual station	10.00
Each residence primary party line station	7.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line	$15.00
Each primary station	10.00
Each extension station	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type of location of those instrumentalities.

Each business primary individual or party line station	$10.00
Each residence primary individual station	7.50
Each residence party line station	5.00

(C) For supersedure of service including the transfer of the telephone number from one party to another, with no change in type or location of equipment:

Each business primary individual or party line station	$ 5.00
Each residence primary individual or party line station	3.50

(D) If, at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service. (As classified in paragraph (A), omitted.) The application of the above service connection charges, with exceptions, is covered in Rule and Regulation No. 15.

The amounts representing the increase in connection charges and charges for supersedure of service over and above those which are now being charged by petitioner in the same respective categories and the newly established charges for supersedure of service where no charge has been previously made, shall be charged to Account No. 175, Contributions to Telephone Plant, the amounts so accruing to be segregated from other charges to said account.

And Further, that Section (d) of Rule No. 15 of Petitioner's Rules and Regulations now in effect, is hereby amended to read as follows, viz.:

> "(d) Service connection charges do not apply in connection with supersedure of service, except as set forth in Exchange Service Schedule B-1a, covering the Honolulu [56] Exchange."

This Order supersedes Commission's Order No. 294 dated July 11, 1938, only insofar as it applies to Schedule B-1.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 1st day of October, 1941.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ F. G. MANARY,
Commissioner,

By /s/ L. L. PATTERSON,
Commissioner,

By /s/ W. J. S. WILLIAMS,
Commissioner.

Attest:

I, J. R. Kenny, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby certify that the foregoing Order No. 379 is a full, true and complete copy of original on file in the office of the Commission.

[Seal] /s/ J. R. KENNY,
Secretary. [57]

EXHIBIT C

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 785

In the Matter of
The Petition of MUTUAL TELEPHONE COMPANY

PETITION

To the Honorable Public Utilities Commission of the Territory of Hawaii:

The petition of Mutual Telephone Company, hereinafter referred to as petitioner, respectfully shows unto this Honorable Commission as follows:

I.

That petitioner, whose principal office is located at 1126 Alakea Street, Honolulu, Hawaii, is a corporation duly incorporated under the laws of the Kingdom of Hawaii, on or about August 16, 1883. That petitioner is now existing under and by virtue of the laws of the Territory of Hawaii and is a regularly authorized public utility furnishing telephone service on the Island of Hawaii, Maui, Molokai, Oahu and Kauai, Territory of Hawaii, and radio telephone service between said Islands as well as radio telephone service to the toll, radio telephone and connecting systems of the American Telephone & Telegraph Company of the United States and foreign countries and ships at sea, and also wireless telegraph service between the Islands of Oahu, Hawaii, Maui, Molokai, Lanai and Kauai.

II.

That the presently effective classification of rates, tolls and charges of petitioner, and petitioner's presently effective rules and regulations affecting rates and service and information relating thereto, as far as its entire public business is concerned, are on file with the Public Utilities Commission of the Territory of Hawaii. [60]

III.

That pursuant to Decision No. 51 and Order No. 379 filed by the commission on October 24, 1941, the Commission approved the increase of certain service connection charges and the increase and establishment of certain charges for supersedure of service for Zones 1 and 2 of the Honolulu Exchange area, which said charges are more fully set forth in the said decision and order. That the increase in said connection charges and the establishment of new supersedure charges had for its primary purpose the discouragement in the abnormal demand for the Company's service. That petitioner has been directed by letter dated April 10, 1942 of Colonel Carroll A. Powell, U. S. Army Signal Corps, to assist in establishment of a system of priorities for telephone allocations. A copy of said letter of April 10, 1942 is field herewith, marked Exhibit A, and made a part hereof. Under the circumstances and since the primary reason for the entering of Decision No. 51 and Order No. 379 has been obviated by the said directive of April 10, 1942, petitioner believes that it is advisable that the Commission enter

an order, effective as of April 1, 1942, reestablishing the connection charges and supersedure rates which were in effect on September 30, 1941.

IV.

That the present service connection charges and charges for supersedure of service for the Honolulu Exchange, as approved by Decision No. 51 and Order No. 379, are set forth on Schedule No. B-1a of petitioner's schedule of rates, which schedule is filed herewith, marked Exhibit B, and made a part hereof.

V.

That the service connection charges and charges for supersedure of service which were in effect on September 30, 1941, and which petitioner believes should be reestablished for the Honolulu Exchange are set forth on Schedule No. B-1, filed herewith as Exhibit C and made a part hereof, which schedule was amended by the said Decision and Order to apply to all Exchanges except Honolulu.

VI.

That Section (d) of Rule 15 of Petitioner's Rules and Regulations, as amended by said Decision and Order, reads as follows: [61]

> "(d) Service connection charges do not apply in connection with supersedure of service, except as set forth in Exchange Service Schedule B-1a covering the Honolulu Exchange."

That in connection with the reestablishment of the former connection charges Section (d) of Rule 15 should be amended to read as follows:

> "(d) Service connection charges do not apply in connection with supersedure of service."

VII.

That in said Decision and Order petitioner was directed to charge to Account No. 175, entitled "Contributions to Telephone Plant" receipts representing the increase in connection charges and charges for supersedure of service over and above those which were in effect just prior to the effective date of the order in the same respective categories and the newly established charges for supersedure of service, where no charge had previously been made, and to segregate said receipts from other charges to said account; that petitioner has charged all such moneys received since October 1, 1941, to a sub-account in said Account No. 175, which said sub-account is entitled "175.2—Liability for Installation Charges"; that the accrued amount set forth in said sub-account No. 175.2 received from the aforesaid sources and segregated by petitioner from other moneys in said account was, as of February 28, 1942, $27,094.50; that petitioner believes that the amount of receipts in said special account, as of the effective date of the order herein sought to be made reestablishing the former connection charges and charges for supersedure of service should be recaptured by the company as income, in install-

ments spread equally over a five-year period beginning with the calendar year 1942.

Wherefore, petitioner prays that a hearing may be had upon this petition; that upon a hearing thereof the Commission make an order—(1) establishing for all Exchanges, effective May 1, 1942, the service connection charges and rates for supersedure of service set forth on Schedule B-1 now applicable to all Exchanges except Honolulu; (2) amending Section (d) of Rule 15 as set forth in Paragraph VI of this petition, and (3) authorizing petitioner to recapture as income, installments spread equally over a five-year period, beginning with [62] the calendar year 1942, the aggregate amount of receipts charged to said sub-account No. 175.2 up to and including May 1, 1942.

Dated Honolulu, Hawaii, April 21, 1942.

MUTUAL TELEPHONE COMPANY,

By /s/ ALVAH A. SCOTT,
Its President,

By /s/ W. C. AVERY,
Its Treasurer.

Territory of Hawaii,
City and County of Honolulu—ss.

Alvah A. Scott, being first duly sworn, on oath deposes and says: That he is President of Mutual Telephone Company, the within-named petitioner; that he makes this verification for and on behalf of

said petitioner and is authorized so to do; that he has read the foregoing petition, knows the contents thereof, and the same are true.

/s/ ALVAH A. SCOTT.

Subscribed and sworn to before me this 21st day of April, 1942.

/s/ GEORGE B. PALMER,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945. [64]

EXHIBIT D

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 785

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for the Re-establishment of Certain Service Connection Charges and Supersedure Charges, Amending Section (d) of Rule No. 15 and for Recapture as Income of Receipts Charged to Sub-account No. 175.2.

Decision No. 57

Before: V. B. Libbey, Chairman;
A. H. Rice, Commissioner;
F. G. Manary, Commissioner;
W. E. Eklund, Commissioner.

Decision

The Mutual Telephone Company filed a Petition with the Commission on April 22, 1942, requesting authorization for the following:

(1) "establishing for all Exchanges, effective May 1, 1942, the service connection charges and rates for supersedure of service set forth in Schedule B-1 now applicable to all Exchanges except Honolulu;

(2) amending Section (d) of Rule 15 as set forth in Paragraph VI of Petition; and

(3) Authorizing petitioner to recapture as income in installments spread equally over a five-year period, beginning with the calendar year 1942, the aggregate amount of receipts charged to sub-account No. 175.2 up to and including May 1, 1942."

Representatives of the Company appeared before the Oahu members of the Commission at date of April 20, 1942, and acknowledged that the results which had been anticipated by the installation of these charges had not been attained. This fact was substantiated by the submission of figures showing a continued abnormal increase of new phone installations subsequent to the creation of these increased charges. In addition it was also pointed out that upon order of the Military authorities a system of priorities had been ordered into effect; that such system would be administered through certain designated representatives [66] appointed by the Office of the Signal Officer at Fort Shafter, T.H., and that by adherence to this system the pres-

ent increased charges for new installations and supersedures would not be necessary.

At date of April 29, 1942, the Auditor for the Commission after an investigation prepared a report on the subject matter, recommending therein that under the existing circumstances it was in the interest of all parties concerned that the charges for installation and supersedures established by Commission's Decision No. 51 and Order No. 379 should be canceled and the rates in effect prior to October 1, 1941, for this type of service should be reestablished. The Commission is therefore of the opinion that the said increased charges for new installations and supersedures authorized by its above numbered Decision and Order should be canceled and the rates and charges set forth in Schedule B-1 of Order No. 294 should be reestablished.

Section (d) of Rule 15 applicable thereto therefore also becomes subject to change in order to be consistent with the reestablishment of charges outlined above, and it is, therefore the opinion of the Commission that this rule as amended should read as follows:

> "(d) Service connection charges do not apply in connection with supersedure of service."

Petitioner's request for authorization to recapture as income in intallments spread equally over a five-year period, beginning with the calendar year 1942, the aggregate amount of receipts charged to

account No. 175.2 up to and including May 1, 1942, from the evidence and testimony presented does not appear to the Commission to be the proper method by which this amount should be accounted for after giving consideration to the purposes for which these monies were obtained from subscribers. As stated by the Commission in its Decision No. 51 authorizing these charges, it was at that time intended that these funds would become a deduction from the computation of rate base figures and that subscribers would be spared paying a capital charge on same. It does not appear to the Commission that the status of these funds has changed since that time and it is therefore the Decision of the Commission that the accrued balance in account No. 175.2 shall, until further orders of the Commission, be considered as "Contribution to Telephone Plant" and be treated as a reduction of the net investment in arriving at a rate base. The Commission further decides, however, that upon motion of the Commission or [67] upon application of the Company at some future date, other disposition of the accrued balance in said account No. 175.2 might be made as conditions warrant.

An Order conforming to the above Decision will issue.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 16th day of July, 1942.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,

Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ W. E. EKLUND,
Commissioner,

By /s/ F. G. MANARY,
Commissioner. [68]

Before the Public Utilities Commission of the Territory of Hawaii

Docket No. 785

In the Matter of

The Petition of the MUTUAL TELEPHONE COMPANY, for the Re-establishment of Certain Service Connection Charges and Supersedure Charges, Amending Section (d) of Rule No. 15 and for Recapture as Income of Receipts Charged to Sub-account No. 175.2.

ORDER No. 406

A Decision in the above-entitled matter having been rendered, it is Ordered, that Petition is hereby authorized to cancel the service connection and supersedure charges authorized in Commission's Order No. 379, and to place in effect as of May 1, 1942, the following service connection and supersedure charges, viz:

Exchange Service Schedule No. B-1

Service Connection Charges — All Exchanges

Service Connection Charges applicable to all ex-

change service facilities furnished within the Exchange Area of all exchanges.

(A) The charge for each of the following listed units of facilities upon application for installation shall be:

(1) Individual or party line service:

Each business primary line station..	$3.50
Each residence primary line station.	3.50
Each business or residence extension	1.50

(2) Private Branch Exchange Service:

Each trunk line.....	3.50
Each primary station.....	3.50
Each extension station.....	1.50

(B) For establishment of service by the use of instrumentalities already in place upon the subscriber's premises and where no change is made in the type or location of those instrumentalities, $1.50.

(1) This charge does not apply in the case of a supersedure.

(C) If at the subscriber's request, a change is made in location or type of facilities, the charge for Moves and Changes are applicable to the change, provided the total charges shall not exceed the charges for the initial establishment of service as classified in paragraph (A). The application of the above service connection charges, with exceptions, is covered in Rule and Regulation No. 15. [69]

It is further ordered that Section (d) of Rule 15 of Petitioner's Rules and Regulations be amended and that upon amendment the said Rule will read, as follows:

"(d) Service Connection charges do not apply in connection with supersedure of service."

It is further ordered that the amount of monies collected by Petitioner through the increased installation and supersedure charges as authorized by Commission's Order No. 379 shall be retained in Sub-account No. 175.2 "Contributions to Telephone Plant" and shall not be taken into the income account until such time as the Commission may authorize such action.

This Order supersedes Commission's Order No. 379 dated October 1, 1941.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 15th day of July, 1942.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ V. B. LIBBEY,
Its Chairman,

By /s/ A. H. RICE,
Commissioner,

By /s/ W. E. EKLUND,
Commissioner,

By /s/ F. G. MANARY,
Commissioner. [70]

EXHIBIT "E"

Extracts from the "Uniform System of Accounts" Prescribed by the Federal Communications Commission, Issue of June 19, 1935, Effective January 1, 1936

Balance-Sheet Statements

I. Investments

Asset Side:

100.1. Telephone plant in service.
100.2. Telephone plant under construction.
100.3. Property held for future telephone use.
100.4. Telephone plant acquisition adjustment.
101.1. Investments in affiliated companies.
101.2. Advances to affiliated companies.
102. Other investments.
103. Miscellaneous physical property.
104. Sinking funds.
105. Company securities owned.

II. Current Assets

113. Cash.
114. Special cash deposits.
115. Working funds.
116. Temporary cash investments.
117.1. Notes receivable from affiliated companies.
117.2. Other notes receivable.
118. Due from customers and agents.
120.1. Accounts receivable from affiliated companies.
120.2. Other accounts receivable.
121. Interest and dividends receivable.
122. Material and supplies.

123. Other current assets.

III. Other Assets

126. Subscription to capital stock.
127. Subscriptions to funded debt.

IV. Prepaid Accounts and Deferred Charges

129. Prepaid rents.
130. Prepaid taxes.
131. Prepaid insurance.
132. Prepaid directory expenses.
133. Other prepayments.
134.1. Discount on capital stock.
134.2. Capital stock expense.
135. Discount on long-term debt.
136. Provident funds.
137. Insurance and other funds.
138. Extraordinary maintenance and retirements.
139. Other deferred charges.

Liability Side:

V. Stock

150. Capital stock.
151. Stock liability for conversion.
152. Premium on capital stock.
153.1. Capital stock subscribed.
153.2. Installments paid on capital stock.

VI. Long-Term Debt

154.1. Funded debt.
154.2. Funded debt subscribed.
155. Receivers' certificates.
156. Advances from affiliated companies.
157. Other long-term debt.

VII. Current Liabilities

158.1. Notes payable to affiliated companies.
158.2. Other notes payable.
159.1. Accounts payable to affiliated companies.
159.2. Other accounts payable.
160. Customers' deposits.
162. Matured interest and dividends.
163. Matured long-term debt.
164. Advance billing and payments.
165. Other current liabilities.

VIII. Accrued Liabilities Not Due

166. Taxes accrued.
167. Unmatured interest, dividends, and rents accrued.

IX. Deferred Credits and Reserves

168. Premium on long-term debt.
169. Insurance reserve.
170. Provident reserve.
171. Depreciation reserve.
172. Amortization reserve.
173. Employment stabilization reserve.
174. Other deferred credits.

X. Contributions of Telephone Plant

175. Contributions of telephone plant.

XI. Surplus

180. Surplus reserved.
181. Unappropriated surplus. [73]

Instruction 20. (B)

"Telephone plant contributed to the company or

constructed by it through expenditures of contributions of money or its equivalent shall be charged to the telephone plant accounts at its original cost (estimated if not known) and there shall be credited to the depreciation reserve and amortization reserve accounts the estimated amounts of the reserve requirements, if any, applicable to the plant. The difference between the amounts so includible in the telephone plant and the reserve accounts shall be credited to account 175, 'Contributions of telephone plant.'

Note.—Amounts received for construction which are ultimately to be repaid wholly or in part, shall be credited to account 174; when final determination has been made as to the amount to be returned, any unrefunded amounts shall be credited to account 175."

Account Number 175

"Contributions of telephone plant.—(A) This account, in accordance with instruction 20-B, shall include the amounts of money or its equivalent contributed directly or indirectly for or in connection with the construction or acquisition of telephone plant. The records shall be kept so that the amount and description of each contribution and from whom received will be readily available.

(B) When the service, in connection with which the contribution was made, is permanently discontinued by the company the amount in this account with respect to that service shall be debited hereto and credited to account 402, 'Miscellaneous credits to surplus.'

Note.—Except as provided in paragraph (B) the amounts of contributions shall be permanently carried in this account."

EXHIBIT F

VI. Operating Expenses

Ac. 672—Relief and Pensions

Costs and expenses in connection with the employees' pension system are charged to this account. The portion of such costs and expenses applicable to construction and custom work is credited to this account. The charges and credits to this account for the years 1946 and 1947 are tabulated below:

Subac. No.	Relief and Pensions (Ac. 672)	1946 Amount	%	1947 Amount	%	% Increases
672-131	Service Pension Accruals	$110,152.17	94.45	$147,230.81	93.74	33.66
672-138	Overhead Constr. Costs—Cr.	5,435.38	4.66	9,634.26	6.13	77.25
672-231	Service Pension Accruals—Transpacific	7,596.21	6.51	9,464.88	6.03	24.60
672-331	Service Pension Accruals—Interisland	2,770.07	2.38	7,947.39	5.06	86.90
672-431	Service Pension Accruals—Wireless	1,535.82	1.32	1,987.49	1.26	29.41
672-731	Service Pension Accruals—Mobile	.....	.....	58.60	.04	.....
	Total	$116,618.89	100.00	$157,054.91	100.00	34.67
	Index	74.25		100.00		

The company's pension system was established on July 1, 1931. It was, and is, a joint contributory system. The contributions of employees were originally set actuarially so as to produce, when matched

by the company, a total retirement allowance of approximately 1½% times the employee's average pay for the last ten years of service times his total creditable service. This was not a guaranteed 1½% but a so-called "money purchase plan" whereby the actual retirement allowance was based on the employee's accumulated contributions, with interest, matched by the company, and the total thus providing an annual retirement allowance based on mortality tables. Due in part to changes in mortality tables, also to some decrease in return on invested funds of the pension system and to wage increases during recent years being more rapid than originally estimated, the actual retirement allowance during recent years dropped somewhat below the 1½% originally contemplated. Accordingly, amendments were made to the Rules and Regulations of the pension system, effective July 1, 1946, which provided a guaranteed 1½% times average pay for the last ten years times years of service. No change was made in the percentage of wages contributed by the employee. Therefore, this amendment had two principal effects as far as contributions by the company were concerned. It increased the payments required to meet current accruing liabilities, and it also increased the total amount of liability for service prior to the establishment of the system in 1931, and therefore the contributions by the company required to amortise this latter amount.

The pension system as originally set up provided for retirement at age sixty. If an employee continued to work for the company after age sixty,

he made no further contributions, and the additional years of service after his sixtieth birthday were not counted in computing his retirement allowance. The amendments of July 1, 1946, changed this provision so that now, if an employee continues to work after age sixty, he will continue to make his normal contributions to the system, and the additional years of service will be counted in computing his retirement pay. This latter amendment also had an effect in increasing the liability for past service. The rapid increase in wages during the past few years has been another factor which increased the liability for past service. [77]

VI. Operating Expenses

At the time the pension system was established in 1931, the liability for past service amounted to approximately $234,000. Contributions made by the company to the system from 1931 through 1947 have totaled $1,180,108. This amount has been apportioned by the Actuary toward amortizing the past service liability and meeting current accruing liabilities. It was originally estimated that the past service liability would be amortized 30 years after the establishment of the system. The amendments made in 1946, together with the rapid increase in wages, have, however, substantially increased the accrued liability for past service, and the company's contributions to the system at the time of these amendments were also increased from 4.09% of pay roll to 5%. The company's contribution of 5% of pay roll, was made up of 3.34% for current

liabilities and 1.66% for accrued liability for past service, for the year 1947. Investments of the system, as of June 30, 1947, to $1,214,515.84 in bonds and $751,226.37 in stocks, or a total of $1,965,742.41.

The Actuary estimated at the time the amendments became effective that the past service liability would be amortized in 39 years from that time. The total amount of the past service liability as reported by the Actuary on June 30, 1947, was $812,111.

Ac. 675—Other Expenses:

Included in this account are all operating expenses not properly chargeable to other accounts such as directors fees, audits, dividend expenses, costs of publishing annual reports to stockholders and valuation expenses. The expenses charged Ac. 675 amounted to $19,088.47 in 1946 and $22,245.35 in 1947 or an increase of 16.5%. These expenses constituted about 2.5% of the total general and other operating expenses for the year 1947.

Ac. 677—Expenses Charged Construction—Credit:

This account is credited and the appropriate construction accounts charged with amounts representing a portion of general office salaries and expenses applicable to construction work.

In determining the credits to Ac. 677, the ratio of General Expense Accounts 661, 662.1, 663.2 and 665.3-139 to total pay rolls is first established:

$$\text{General Expense Ratio} = \frac{\text{Acs. 661, 662.1, 663.2 and 665.3-139} = \text{(A)}}{\text{Total Payrolls}}$$

The ratio between the portion of clearing accounts cleared to construction and the total clearing accounts is next established:

$$\text{Clearing Ac. Ratio} = \frac{\text{Clearances to Construction} = (B)}{\text{Total Clearances}}$$

The clearing account ratio (B) is applied to the labor charges in the same clearing accounts which produce the estimated labor in clearing accounts charged construction. This result is added to direct labor charged during the month to constructions and the total amount is multiplied by the General Expense Ratio (A). This result is divided by direct labor charged to construction which produces the credits to Ac. 677:

$$\text{Credits to Ac. 677} = \frac{(A) \times (\text{Direct Construction Labor} - (B) \times \text{Labor in Clearing Acs. cleared to Construction})}{\text{Direct Construction Labor}}$$

EXHIBIT G

Certificate of Charter Membership and Prior Service Credit in the Retirement System of Mutual Telephone Company Honolulu, Hawaii

This Is to Certify, That..... is a member of the Retirement System of Mutual Telephone Company and is registered as member number.....as of July 1, 1931, and is entitled to all the rights and privileges provided by the Rules and Regulations of the Retirement System, adopted by the Board of Directors of Mutual Telephone Company on April 16, 1931, or as they may hereafter be amended, and

That, the Board of Managers hereby certifies that the above-named member is entitled to a prior service credit of.....years, ...months, and..... days in full for all service rendered prior to the first day of July, Nineteen Hundred and Thirty-one.

In Testimony Whereof, the Board of Managers of the Retirement System of Mutual Telephone Company has caused this certificate to be issued.

Issuance of this certificate authorized at a meeting of the Board of Managers held on the..... day of....., 19....

.....,
Secretary.

Board of Managers
J. A. Balch, Ex-Officio Member;
F. G. Hummel, Chairman;
F. C. Atherton,
W. C. Avery,
R. H. Midcalf,
F. Marshall-Salsbury. [80]

EXHIBIT I

(Copy)

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 988

In the Matter of

The Application of MUTUAL TELEPHONE COMPANY, for Approval of Revised Schedules of Rates and Charges.

DECISION No. 102

ORDER No. 598

"Extract from Pages 6 and 7 of Decision No. 102

"General and other operating expenses include a provision for 'Relief and Pensions,' Account 672. Under this classification there has been included a sum of $183,500 for 1948, and $183,900 for 1949. Company records show that approximately 1/3 of such costs $61,300.00 for 1949, for example, is to provide for the pension liability of past years under the company's pension plan. While for the purposes of this decision the full pension cost is allowed, there is a question as to whether present telephone subscribers should make up for past services.

"It is the view of the Commission that, when reasonably possible in the future, extra earnings should be employed to reduce this past service obligation.

"At the present time under Account 175, 'Contribution of Telephone Plant,' there appears an amount of $41,970.50[3]. It is the judgment of the Commission that this amount may well be trans-

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[3]The $41,970.50 represents payment made by telephone subscribers in the past principally for service connection charges. In Decision No. 57, and Order No. 406 dated July 16, 1942, the Mutual Telephone Company was ordered to maintain this amount in Account No. 175.2 until further directed."

ferred to the pension reserve to reduce the past service obligation and the order that follows will so provide."

Filed August 12, 1948, at 11:30 o'clock a.m.

/s/JEAN KENNY BRADFORD,
Secretary of the
Commission.

Before the Public Utilities Commission
of the Territory of Hawaii
Docket No. 988

In the Matter of

The Application of MUTUAL TELEPHONE COMPANY, for the Approval of Revised Schedules of Rates and Charges

ORDER No. 598

Pursuant to Commission's Decision No. 102 entered in the above-entitled matter this 7th day of August, 1948, it is hereby

Ordered: (1) That applicant, Mutual Telephone Company, is hereby authorized to file and publish the schedule of rates and charges set forth in Exhibit "A" attached hereto, and by reference made a part hereof, together with the conditions as set forth in Exhibit 20 which was filed by applicant in this proceeding, and to make said rates, charges and conditions effective on and after August 11, 1948, for service furnished on and after that date, except for rates and conditions applicable to intra-island message toll telephone service, which shall be made effective August 16, 1948.

(2) That applicant include the following conditions in each of its tariffs applicable to rural line service on Oahu, Hawaii, Maui and Kauai:

> "Rural Line Service is ten-party service, and not more than ten primary stations will be connected to a line, except upon authorization of the Public Utilities Commission of the Territory of Hawaii."

Applicant is hereby authorized to continue to serve more than ten primary stations per line, where such service arrangement is presently in effect, for a period of not more than one year from the effective date of this Order.

(3) That applicant file with this Commission, by September 1, 1948, a list of all lines having more than ten primary stations connected thereto, showing the number of primary stations on each line, and file monthly thereafter a statement showing the reductions made in primary stations on such lines. These statements may be discontinued at such times as the primary stations on each line do not exceed ten.

(4) That applicant transfer the amount of $41,970.50, presently carried in Account 175.2, "Contributions of Telephone Plant," to its pension reserve to reduce the accrued liability for past service.

(5) That applicant proceed with a separation study of its toll and exchange operations and of its intra-island, inter-island and other toll opera-

tions. Such study shall be made, in general, in accordance with the "Standard Procedures for Separating Telephone Property, Revenue and Expenses," prepared by the NARUC-FCC Special Cooperative Committee on Telephone Regulatory Procedure. Such study shall be made for the year 1949, and, unless otherwise authorized by this Commission, for succeeding years.

Done at Honolulu, City and County of Honolulu, Territory of Hawaii, this 7th day of August, 1948.

PUBLIC UTILITIES COMMISSION OF THE TERRITORY OF HAWAII,

By /s/ J. M. DOWDA,
Its Chairman;

By /s/ J. HAROLD HUGHES,
Commissioner;

By /s/ M. R. AGUIAR, JR.,
Commissioner;

By /s/ F. G. MANARY,
Commissioner;

By /s/ LEO G. LYCERGUS,
Commissioner.

Attest:

I, Jean Kenny Bradford, Executive Secretary of the Public Utilities Commission of the Territory of Hawaii, do hereby certify that the foregoing Order No. 598 is a full, true and complete copy of original on file in the office of the Commission.

/s/ JEAN KENNY BRADFORD,
Secretary.

EXHIBIT "A"

Basic Exchange Rates, P.B.X. Trunk Rates—Dial Exchanges

The following rates are authorized in dial exchanges:

Monthly Rate—Each Primary Station

Rate Group	Business Service 1-Party	2-Party	Rural*	Residence Service 1-Party	2-Party	4-Party	Rural*
A	$10.50	$8.50	$8.00	$4.75	$4.00	$3.50	$3.50
B	8.25	7.00	6.75	4.25	4.00	3.50	3.50
C	7.50	6.50	6.25	4.00	3.75	3.50	3.50
D	7.00	6.00	6.00	4.00	3.75	3.50	3.50

* Ten-party service.

Monthly Rate—Each P.B.X. Trunk

Rate Group	Two-Way	One-Way
A	$15.75	$14.75
B	12.25	11.25
C	11.25	10.25
D	10.50	9.50

Rate Group	Exchange or Serving Area
A	Honolulu
B	Hilo and Wailuku
C	Aiea S.A.,* Kailua S.A.,† Lihue, Pearl City,* and Wahiawa
D	Honomu, Kalaheo S.A.,‡ Kilauea, Kohala, Kula, Lahaina, Laupahoehoe, and Waimea (Kauai)

* Serving area of the Aiea-Pearl City-Waipahu exchange.

† Serving area of the Kailua-Kaneohe exchange.

‡ Serving area of the Eleele exchange.

Residence and Extension and Hotel P.B.X. Station Rates

The following rates are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

	Rate Per Month
Each residence extension station	$1.25
Each hotel P.B.X. station rate	1.25

Exhibit "A"—(Continued)

P.B.X. Switchboard Rates

The following rates are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

P.B.X. Switchboard	Rate Per Month Manual or Dial
Cordless	$ 7.00
50 Line-Cord	12.00
100 Line-Cord	15.00
200 Line-Cord	20.00
300 Line-Cord	25.00
Multiple, per position	25.00

Service Connection Charges

The following charges are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

	Charge
1. Instruments not in place:	
Each business primary station	$7.00
Each private branch exchange trunk	7.00
Each residence primary station	5.00
Each extension station	2.50
Each P.B.X station	2.50
2. Instruments in place:	
No change in type or location	2.50
Supersedure	1.50

Move and Change Charges

The following charges are authorized in all exchanges on Oahu, Hawaii, Maui and Kauai:

1. Moves on same premises: Each station $2.50
2. Move from one premises to another premises. Service connection charge applicable at new location.
3. Change in type of instrument $2.50
4. Other changes ..... Actual cost

Exhibit "A"—(Continued)

Toll Service
Message Toll Telephone Service

All Intra-Island Toll Routes
Hawaii, Kauai, Maui, Oahu

Air-Line Mileage		Initial and Overtime Cents Per Message							
		Station-to-Station				Person-to-Person			
	Not	Weekdays		Night & Sun.		Weekdays		Night & Sun.	
More Than	More Than	1st 3 Min.	Over-time	1st 3 Min.	Over time	1st 3 Min.	Over-time	1st 3 Min.	Over-time
0	11	10c	5c(2)	10c	5c(2)	20c	5c(1)	20c	5c(1)
11	20	15c	5c(1)	15c	5c(1)	25c	5c(1)	25c	5c(1)
20	30	20c	5c(1)	15c	5c(1)	30c	10c(1)	25c	5c(1)
30	45	25c	5c(1)	20c	5c(1)	35c	10c(1)	30c	10c(1)
45	65	30c	10c(1)	25c	5c(1)	40c	10c(1)	35c	10c(1)
65	90	35c	10c(1)	30c	10c(1)	45c	15c(1)	40c	10c(1)

Note: Figures inside parentheses () indicate the number of minutes for which the overtime rates apply.

Airline mileages are to be in accordance with Exhibit 20, filed in Docket No. 988, entitled "Proposed Local Toll Tariffs," except no mileage shall be shown between the following points, and a notation shall be made that service between such points is exchange service.
Kaneohe-Kailua Waipahu-Aiea Waipahu-Pearl City Aiea-Pearl City

Private Line Service

The following rates are authorized for private line services on Oahu, Hawaii, Maui and Kauai:

Types of Circuit	Rate Per Month Per Quarter Mile or Fraction Thereof	
	Intraexchange	Interexchange
Regular Voice Circuits	$ .75	$1.25
Regular signal, control and teletypewriter circuits	.75	.75
High quality broadcasting, radiotelephone and other special leased line circuits	1.25	1.25

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that the following statement of facts shall be considered as true and in evidence. This stipulation of facts is supplemental to the stipulation of facts in this case which was filed March 26, 1951.

I.

In 1949 Plaintiff paid the sum of $232,777.36 to the Retirement System of Mutual Telephone Company; and during this year in determining its taxable net income Plaintiff deducted the sum of $190,806.86 representing statutory deductions under the Internal Revenue laws on account of Plaintiff's obligation, if any, under the provisions of the Retirement System, a copy of which is attached to the stipulation, filed March 26, 1951, and marked Exhibit H. [37]

Dated Honolulu, Hawaii, this 5th day of June, 1951.

MUTUAL TELEPHONE
Plaintiff,

By /s/ MARSHALL M. GOODSILL,
Attorney for Plaintiff,

UNITED STATES
OF AMERICA,
Defendant,

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Defendant.

[Endorsed]: Filed June 5, 1951. [38]

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

DECISION

The question here presented is whether the Commissioner of Internal Revenue erred in his determination that the taxpayer, under Sections 22(a), 41, and 42 of the Internal Revenue Code, was required to include in its taxable income for the calendar years 1941 and 1942, the increased installation and "supersedure" charges that it received from its subscribers, following the authorization for such charges by the Public Utilities Commission of the Territory of Hawaii.

The pertinent sections of the Internal Revenue Code are copied in the margin.* [127]

1. Findings of Fact

The facts in this case have been stipulated, and are adopted by this Court as its Findings.

I.

The plaintiff is a corporation organized under the laws of the Kingdom of Hawaii and existing under the laws of the Territory of Hawaii. It is a public utility whose principal business consists in furnishing wire telephone service in the Islands. It is subject to the jurisdiction of the Public Utilities Commission of the Territory, hereinafter referred to as the Commission, under Chapter 82, Revised Laws of Hawaii, as amended. Its rates, fares, charges, records, accounting system, [128] financial

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"*Section 22. Gross Income

"(a) General Definition. 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
* * *

"Section 41. General Rule. The net income

transactions, etc., are subject to the regulation of the Commission.

II.

On September 10, 1941, the plaintiff filed a petition with the Commission, which was assigned Docket No. 764, in which the plaintiff requested the Commission to authorize certain increases in its installation tariffs and to authorize establishment of new "supersedure" tariffs for the purpose of diminishing the demand for new telephone service in Honolulu.

Installation, or connection, charges are of two types—service connection charges and reconnection charges. A service connection charge is one customarily made by the plaintiff for connecting each telephone instrument newly placed into a subscriber's premises. A reconnection charge is one ordinarily made by the plaintiff for reconnecting a dead instrument already in place. A supersedure charge is one, not theretofore made by the plaintiff, for

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shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer. * * *

"Section 42. Period in which items of gross income included:

"(a) General rule. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under Section 41, any such amounts are to be properly accounted for as of a different period. * * *"

substituting a new subscriber for a prior subscriber at the same premises, where the telephone instrument is not dead and is not reconnected.

III.

After a hearing on the above petition, the Commission filed its Decision No. 51 and its Order No. 379. In the Decision the Commission approved the plaintiff's request, and in its Order it made the requested increases in the installation and the supersedure tariffs.

In the Decision, the Commission found that while the plaintiff did not contend that additional income was [129] required, it did maintain that the additional charges were required for the retarding effect; that the plaintiff had made no showing that an increase in revenue was required and that the Commission believed that it was improper to allow the increase to go through in a manner which would permit it to be passed on to the common stockholders in the form of increased dividends; that the increase would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates would be a reduction from the net investment in arriving at a rate base, and that investors would not require a return and subscribers would be spared paying a capital charge on it; that on motion of the Commission or other application of the plaintiff, other disposition of the accrued balance might be made as conditions warranted; and that in the opinion of the Commission the increased charges should be but temporary.

In Order No. 379 the Commission directed that the increased installation and the new supersedure charges should be charged to Account No. 175, Contributions to Telephone Plant, and the amounts so accruing should be segregated from the other charges in said account.

IV.

The increased installation and the supersedure charges were put into effect by the plaintiff as of October 2, 1941. On April 22, 1942, the plaintiff filed with the Commission a petition in which it requested [130] a termination of the additional charges. The Signal Corps of the United States Army had established a system of priorities for telephone allocations and consequently the plaintiff considered the additional charges no longer necessary.

V.

Pursuant to the filing of the aforesaid petition, the Commission, by Decision No. 57 and Order No. 406, filed on July 18, 1942, terminated the increased and newly-established charges as of May 1, 1942. In its decision and order, the Commission directed that the additional charges collected by the plaintiff under the earlier decision and order were to be held in Account No. 175 until the Commission should determine their final disposition.

VI.

For many years the plaintiff has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by

the Federal Communications Commission, which system was prescribed for the plaintiff by an earlier order of the Commission.

Account No. 175, "Contributions of Telephone Plant," is one of the accounts provided for in the said Uniform System. In accordance with that System, the plaintiff credited to Account 175 contributions by its subscribers for line extensions. Such contributions by its subscribers have never been reported by the plaintiff as income for Federal income tax purposes, and have never been taxed [131] as income.

In 1945, the Federal Communications Commission amended the said Uniform System of Accounts by eliminating Account No. 175 and instructing that the amounts held in such account be deducted from the appropriate plant asset accounts. The plaintiff in 1945, complied with these instructions with respect to the amounts in Account No. 175 that represented contributions for line extensions. Subaccount 175.2, however, referred to below, was retained intact because of the said Order No. 406 of the Commission, terminating the increased and newly-established charges and directing that those which had been theretofore collected be held in Account No. 175.

The increased installation and the new supersedure charges were collected by the plaintiff from subscribers from October 2, 1941, to May 1, 1942. Pursuant to the said Order No. 379 of the Commission, the plaintiff credited amounts equal to its collections of the increased installation and new

supersedure charges to a new Subaccount No. 175.2, entitled "Liability for Installation Charges." This new subaccount was started by the plaintiff and maintained as a subaccount under the general Account No. 175, "Contributions of Telephone Plant" in order that the amounts in Subaccount 175.2 could be segregated from the other amounts credited to Account No. 175 in accordance with the Commission's order.

The defendant does not concede that the [132] sums received by the plaintiff from subscribers on account of the increased installation and the new supersedure charges which were credited to Subaccount 175.2 were or are liabilities of the plaintiff.

The plaintiff received $13,341.50 and $28,673 in 1941 and 1942, respectively, on account of the increased and the newly-established installation and supersedure charges. This total of $42,014.40 was adjusted to $41,970.50 in February, 1944, to correct an accounting error of $44 that was detected in reconciling the accounts.

VII.

Subaccount No. 175.2 was credited with all the increased installation and new supersedure charges collected by the plaintiff under Decision No. 51 and Order No. 379, supra. These additional charges were not billed to the customer as such. The subscriber was charged in one sum for the total of his installation or supersedure charge. It was recorded on the bill as "Other Charges" and was explained by a supplemental statement sent out with the bill.

This statement was entitled "Statement of Other Charges and Credits" and has several items listed on it. One of these items was "Service Connection Charge" and the installation or supersedure charge in one amount was recorded opposite this item.

Although the billings to subscribers did not show the amount of the increased installation charges separately from previously existing installation charges and did not show the newly-established supersedure charges separately, the plaintiff maintained its [133] accounting records, as it was required to do by the order of the Commission, so as to reflect the amount of the increased installation charges separately from the previously existing installation charges, and so as to reflect the newly-established supersedure charges separately from previously existing charges. The additional charges were all credited to Subaccount 175.2, "Liability for Installation Charges," and the plaintiff maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could have been refunded to the individual customers if this were ever required.

The total cost to the plaintiff of making new service connections exceeded the revenue from the tariffs charged therefor—even including the additional new connection charges authorized by Order No. 379, supra. The cost of materials, including telephone instruments, switches, wiring and cables, and the cost of field labor required to make the installation, were in the case of each new service

connection capitalized by setting up such costs in the plaintiff's plant asset account. These costs remain in the plant asset account until the instrument is removed and at the time of removal are charged to operations. Administration and office expenses in the case of new service connections were charged off as expenses of operations in the year in which they were incurred. The total estimated cost of each new service connection was $13.92 [134] during this period. The cost of materials and field labor, which was capitalized as aforesaid, was approximately 85 per cent of such total cost, and the cost of administration and office expenses, which was expensed as aforesaid, was approximately 15 per cent of such total cost.

The revenue from the tariffs charged for reconnections and supersedures under the Commission's Order No. 379 exceeded the total cost to the plaintiff of making such reconnections and supersedures. Such costs were entirely charged off as expense of operations in the year incurred.

Of the additional revenue (see Paragraph VI) received by the plaintiff on account of the increased charges, approximately 60.55 per cent was received on account of the additional service connection charges, 21.35 per cent on account of the additional reconnection charges, and 18.10 per cent on account of the new supersedure charges.

With the exception of billing and the accounting necessary to keep the additional charges segregated from other charges, the plaintiff was not required to do, and did not do, any additional work or perform any additional service in order to receive the

increased installation charges and the new supersedure charges; that is, it did exactly the same work for subscribers in making connections and supersedures as it had done before the new charges were established and as it did after they [135] were terminated.

Although Sub-account 175.2 was credited with the additional charges as they were collected and the plaintiff's general cash account was debited, the moneys collected by virtue of the additional charges were intermingled with other moneys in the general treasury of the plaintiff, and were used by the plaintiff without regard to their source. The plaintiff at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and the new supersedure charges.

VIII.

The plaintiff maintains its records on the accrual basis, and files its tax returns on the accrual basis for the calendar year. The plaintiff did not report the aforesaid increased and newly established installation and supersedure charges received in 1941 and 1942 as part of its gross income in its tax returns for 1941 and 1942.

IX.

The plaintiff filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942 with the Collector of Internal Revenue of the United States for the District of Hawaii. The Re-

port of Examination by the Internal Revenue Agent in charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income the increased installation charges and the new [136] supersedure charges hereinabove described. A protest of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice of determination of deficiency dated January 8, 1945, was received by the plaintiff. The deficiencies determined by the Commissioner on account of failure to include the said charges in gross income were:

1941	Income Tax Liability		$ 1,978.47
	Excess Profits Tax Liability		6,959.35
1942	Declared Value Excess Profits Tax Liability		1,892.43
	Excess Profits Tax	$24,102.51	
	Less: 10% post war credit	2,410.25	21,692.26
Interest			4,205.88
	Total		$36,728.39

These additional taxes and interest, in the total amount of $36,728.39 for both years, were assessed. They were paid by the plaintiff on February 2, 1945, to Fred H. Kanne, at that time Collector of Internal Revenue for the District of Hawaii. Mr. Kanne is now dead. The payment of these taxes and interest was not charged to Account No. 175.2.

The plaintiff filed claims for refund on December 6, 1946, for each of the calendar years 1941 and

1942 with the Collector of Internal Revenue for the District of Hawaii. The claim for refund for 1941 was for $10,482.57, plus interest; and the claim for 1942 was for $27,951.66, [137] plus interest. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, 1947, proposed that the claims be disallowed. On June 1, 1948, the plaintiff received a notice of disallowance, dated May 19, 1948, covering both claims for refund, in full, from the Commissioner of Internal Revenue.

X.

During 1948, the Commission, following an application by the plaintiff for an increase in rates, held a hearing on the plaintiff's rates and charges.

In 1931, the plaintiff's board of directors established a jointly contributory retirement system, known as the "Retirement System of Mutual Telephone Company," to be operated under a board of managers consisting of the president of the plaintiff and four other persons appointed by the board of directors. The Retirement System is a separate entity from the plaintiff, and maintains its own books and accounts. The plaintiff does not have in its own accounts a "pension reserve," as such, and has reserved the right to discontinue or to reduce at any time its contributions to the Retirement System. An employee who took the necessary steps provided for in the Rules and Regulations of the System was credited with years of service put in prior to the establishment of the System, and was issued a certificate stating that he was entitled to

all the rights and privileges provided for by the Rules and Regulations, and that he was entitled to a specified prior service credit in full for all service rendered prior to July 1, 1931. [138]

Although the plaintiff did not suggest to the Commission at the time of the 1948 hearing that any action be taken regarding Subaccount 175.2, the Commission on its own initiative, in its Decision No. 102, considered the cost to the plaintiff of the Retirement System, and in Order No. 598 directed that the plaintiff "transfer the amount of $41,970.50 presently carried in Account 175.2, 'Contribution of Telephone Plant,' to its pension reserve to reduce the accrued liability for past service."

On December 3, 1948, the plaintiff addressed a letter to the Commission outlining the tax difficulties that had arisen in connection with the additional charges which had been credited to Subaccount 175.2. In that letter, the plaintiff requested that the Commission suspend paragraph 4 of Order No. 598, providing for the transfer of the funds from Subaccount 175.2 to the plaintiff's "pension reserve" until a final determination of the amount transferable. On December 22, 1948, the Commission replied that this matter should be held in abeyance by the plaintiff pending formal approval by the Commission. On February 24, 1949, the Commission advised the plaintiff that it had denied the latter's request to suspend the transfer. On March 1, 1949, the plaintiff deposited $41,970.50 in cash to the account of the Retirement System, in the Bank of Hawaii, and deleted Subaccount 175.2.

On March 8, 1949, the plaintiff advised the Commission of this action.

In 1949 the plaintiff paid the sum of [139] $232,777.36 to the plaintiff's Retirement System; and in the same year, in determining its taxable net income, the plaintiff deducted the sum of $190,806.86, representing statutory deductions under the Internal Revenue laws, on account of the plaintiff's obligation, if any, under the provisions of the Retirement System.

2. Opinion

The Sums Received by the Plaintiff as Increased Connection and "Supersedure" Charges Constituted Gross Income.

The first point urged by the plaintiff is that the sums received by it as increased connection and "supersedure" charges are not includable in the plaintiff's gross income for 1941 and 1942, or in any other year, because they do not constitute "income" within the meaning of the Sixteenth Amendment.

Not only does the language of the Amendment itself and of the Internal Revenue Code refute this contention, but also do the holdings of the Supreme Court negative its validity.

In North American Oil Consolidated v. Burnet, 286 U.S. 417, 424 (1932), Mr. Justice Brandeis said:

"If a taxpayer receives earnings under a claim of right and without restrictions as to its disposition, he has received income which he is required

to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

This "claim of right" doctrine has been consistently followed by the Supreme Court, even down to a few months [140] ago. See Commissioner v. Wilcox, 327 U.S. 404, 408 (1946), affirming 9 Cir., 148 F. 2d 933 (1945); United States v. Lewis, 340 U.S. 590, 592 (1951).

See also Commissioner v. Brooklyn Union Gas Co., 2 Cir., 62 F. 2d 505, 506 (1933); Gilken Corporation v. Commissioner, 6 Cir., 176 F. 2d 141, 145 (1949).

So here, the plaintiff received the additional charges in question under a claim of right. The mere fact that it might later have to disgorge them did not militate against such revenues being "income" when they were received. It would be unconscionable to permit the plaintiff to retain these gains, admittedly unjustified as mere revenue—and, as we have seen, it is permitted to retain them—and yet pay no income tax upon them.

Nor can we in this case be concerned with the niceties of accountancy technique. We are here interested in realities, and not in the jargon of bookkeeping.

In Weiss v. Wiener, 279 U.S. 333, 335 (1929), Mr. Justice Holmes said:

"The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take

into account in determining the pecuniary condition of the taxpayer."

See also Helvering v. Midland Ins. Co., 300 U.S. 216, 225 (1937); Commissioner v. Union Pacific R. Co., 2 Cir., 86 F. 2d 637, 639 (1936); Board v. Commissioner, 6 Cir., 51 F. 2d 73, 75 (1931), certiorari denied, 284 U.S. 658.

As its second contention, the plaintiff insists that the sums received by it as increased connection and [141] supersedure charges are not includable in its gross income for 1941 and 1942 even though they constitute "income" in a subsequent year.

In this connection, if one bears in mind the facts in the instant case, the following language in the case of Board v. Commissioner, supra, 51 F. 2d at pages 75-76, cited with approval by the Supreme Court in North American Oil v. Burnet, supra, is pertinent:

"We are of the opinion that the board was right in allocating this income to the year 1920. That it was actually received during that year is not disputed; nor is it disputed that it was received under a claim of right and as profits to which the petitioner was justly entitled. The only claim made is that the contract whereby petitioner purported to secure his interest in the pipeline was illegal and unenforceable by reason of his position as a director of the Old Dominion Oil Company. In this contention the petitioner of course never acquiesced. The payment was never refunded. Possibly it might have been recovered in the litigation which was instituted for that purpose, but it was not, and

it is at least unusual that a taxpayer should be heard to assert the possibility of an adjudication of alleged misconduct and breach of trust, as relieving him from tax liability which is predicated upon the assumption of the honesty and legality of his acts. Obviously, the sum involved must be considered as income either for the year 1920 or 1927, and we think that it must be allocated to the year 1920, in which it was actually received, rather than to the year 1927, in which the taxpayer's right to retain it was established." (Emphasis supplied.)

See also Penn v. Robertson, 4 Cir., 115 F. 2d 167, 175 (1940.)

3. Conclusion of Law

The increased installation and supersedure charges received by the plaintiff from its subscribers in the [142] calendar years 1941 and 1942 constituted income ascribable to and taxable in those years.

Let judgment be entered for the defendant.

Dated September 28, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed September 28, 1951. [143]

In the United States District Court
for the District of Hawaii

Civil No. 931

MUTUAL TELEPHONE COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above cause having been submitted to this Court on the following: a Stipulation of Facts filed March 26, 1951; a Supplemental Stipulation of Facts filed June 5, 1951; a brief for the plaintiff filed April 16, 1951, by its counsel, Heaton L. Wrenn and Marshall M. Goodsill of the law firm of Anderson, Wrenn & Jenks of Honolulu; a brief for the defendant filed June 5. 1951, by its counsel, Theron Lamar Caudle, Assistant Attorney General; Andrew D. Sharpe and Ruppert Bingham, Special Assistants to the Attorney General, and Howard K. Hoddick, Acting United States Attorney; a supplementary brief for the defendant filed June 5, 1951, prepared by Edward A. Tonjes of the Internal Revenue Bureau; and a reply brief for the plaintiff filed by its counsel on June 19, 1951; and counsel for the plaintiff and the defendant having agreed that the cause would be submitted to the Court on the aforesaid Stipulations of Facts and briefs and that there would be no oral argument,

and the Court being fully advised in the premises and having heretofore filed on September 28, 1951, a decision in this matter which contains findings of fact and conclusions of law, [145]

In accordance with that decision, judgment is herewith entered for the defendant and against the plaintiff, and

It Is Hereby Ordered and Adjudged that the complaint filed herein be and is dismissed, with prejudice. Costs are awarded to the Defendant.

Dated at Honolulu, T. H., this 4th day of December, 1951.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court.

Approved as to form:

HEATON L. WRENN,

MARSHALL M. GOODSILL,
Attorneys for Plaintiff.

By /s/ MARSHALL M. GOODSILL.

[Endorsed]: Filed December 4, 1951. Entered December 4, 1951. [146]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mutual Telephone Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of dismissal entered in this action on December 4, 1951.

/s/ MARSHALL M. GOODSILL,
Attorney for Appellant,
Mutual Telephone
Company.

[Endorsed]: Filed January 31, 1952. [148]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause, numbered from page 1 to page 166 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings, exhibits as hereinbelow listed, that all of said pleadings and exhibits consist of original papers filed in my office and are accompanied by this

certificate, and that the pages of the certified record at which said pleadings and exhibits occur are as hereinbelow indicated:

Pages

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of March, A.D. 1952.

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of Hawaii.

[Endorsed]: No. 13284. United States Court of Appeals for the Ninth Circuit. Mutual Telephone Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed March 6, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 13284

MUTUAL TELEPHONE COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS TO BE RELIED UPON

Comes now Mutual Telephone Company, the appellant in this action, and states that the points upon which it intends to rely in this court in this action are as follows:

1. The United States District Court for the District of Hawaii erred in making and entering its decision dated September 28, 1951, in this action.

2. The United States District Court for the District of Hawaii erred in rendering and entering its judgment of dismissal dated December 4, 1951, in this action.

3. The United States District Court for the District of Hawaii erred in finding that the increased installation and supersedure charges received by appellant from its subscribers in the calendar years 1941 and 1942 constituted income ascribable to and taxable in those years.

4. The increased installation and supersedure charges were not income to appellant in 1941 and 1942 because they were received and held in those years subject to a restriction and were not subject to appellant's "unfettered command," and the United States District Court for the District of Hawaii erred in not so finding and deciding.

5. The increased installation and supersedure charges received by appellant in 1941 and 1942 did not constitute "income" within the meaning of the Sixteenth Amendment, and the United States District Court for the District of Hawaii erred in not so finding and deciding.

Dated Honolulu, T. H., February 21, 1952.

MUTUAL TELEPHONE COMPANY,

By /s/ MARSHALL M. GOODSILL,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 6, 1952.

No. 13284

United States
COURT OF APPEALS
For The Ninth Circuit

MUTUAL TELEPHONE COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF
For Mutual Telephone Company,
Appellant

Appeal from the United States District Court for the District of Hawaii

HEATON L. WRENN
MARSHALL M. GOODSILL
Bank of Hawaii Building,
Honolulu, Hawaii

Attorneys for Mutual Telephone Company, Appellant.

No. 13284

United States
COURT OF APPEALS
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MUTUAL TELEPHONE COMPANY,
a Corporation,

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Honolulu, Hawaii

Attorneys for Mutual Telephone Company, Appellant.

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JURISDICTION

This is a civil action commenced in the United States District Court for the District of Hawaii against the United States for recovery of internal revenue taxes alleged to have been erroneously and illegally assessed and collected. The claim exceeds $10,000 but the Collector of Internal Revenue by whom such tax was collected was dead and was not in office as Collector of Internal Revenue at the time this action was commenced. The District Court had jurisdiction of this action under Title 28, United States Code, Section 1346. Appellant has complied with the requirements of Section 3772(a)(1) and (2) of the Internal Revenue Code regarding suits for recovery of any internal revenue tax.

This court has jurisdiction to review the judgment below under Title 28, United States Code, Sections 41, 1291 and 1294.

The pleadings necessary to show the existence of jurisdiction are the Complaint (R. 3-11), the Second Amendment of Complaint (R. 11-14) and the Answer (R. 15-18). The Decision of the District Court (R. 83-99) was filed September 28, 1951 and the Judgment of the District Court (R. 100-101) was entered December 4, 1951. Appellant has filed a timely Notice of Appeal (R. 102), Bond for Costs on Appeal, Statement of Points on Appeal (District Court), Designation of Contents of Record on Appeal (District Court), and Statement of Points to be Relied Upon and Designation of Record to be Printed (Court of Appeals) (R. 102-106).

STATEMENT OF THE CASE

The question involved in this case is whether the increased "installation" and "supersedure" charges received by appellant from its subscribers in 1941 and 1942 were taxable income to appellant in those years. The Commissioner of Internal Revenue has determined that such installation and supersedure charges were taxable income to appellant in the years received. Appellant contends that such installation and supersedure charges were not taxable income to it in 1941 and 1942 because such charges were received and held in those years *subject to a restriction* and were *not* subject to appellant's "*unfettered command*". Appellant also contends, in the alternative, that such installation and supersedure charges are not taxable income to it in any year because such charges are not "*income*" within the meaning of the Sixteenth Amendment. The District Court held that such installation and supersedure charges were taxable income to appellant in the years received, that is, in 1941 and 1942.

All of the facts in the case have been stipulated.

Appellant is a public utility corporation existing under the laws of the Territory of Hawaii. Appellant's principal business consists of furnishing wire telephone service in the Hawaiian Islands. Appellant is subject to the jurisdiction of the Public Utilities Commission of the Territory of Hawaii, hereinafter sometimes referred to as "the Commission", under Chapter 82, Revised Laws of Hawaii 1945,

as amended (R. 19).[1] Its rates, fares, charges, classifications, rules and practices, and its form and method of keeping accounts, books and records, and its accounting system and its financial transactions are subject to the regulation of the Commission (R. 19).[2]

In 1941, due principally to the tremendous influx of war workers and military personnel and the expansion of the military establishment, appellant experienced an unusually large demand for new telephone service in Honolulu which placed an excessive load on its central office facilities and distribution plant (R. 33-34). At the same time priorities

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[1]The Territorial Public Utilities Act (now c. 82, R.L.H. 1945) was enacted in 1913, and by Act 135, Session Laws of Hawaii 1913 the legislature provided that all public utilities should be subject to the provisions of the Public Utilities Act effective upon the approval thereof by Congress. In 1916 Congress expressly ratified, approved and confirmed said Act 135 and thereby subjected to the Public Utilities Act all utilities doing business in Hawaii. *Inter-Island Co.* v. *Hawaii*, 305 U.S. 306, 310-312, 59 S. Ct. 202 (1938), *affirming* 96 F. 2d 412 (9th Cir., 1938) and 33 Haw. 890.

[2]Pertinent portions of said Chapter 82, Revised Laws of Hawaii 1945, as amended, are as follows:

Section 4715: "All rates, fares, charges, classifications, rules and practices made, charged or observed by any public utility, or by two or more public utilities jointly, shall be just and reasonable and shall be fixed by order of the commission, and no such rate, fare, charge, classification, rule or practice shall be abandoned, changed, modified or departed from without the prior approval of the commission. * * * * * * * * * * * * * * * The commission shall have power, after a hearing *upon its own motion, or upon complaint*,

and restrictions on materials and supplies made it difficult to meet the demands for new service (R. 34-35). Therefore, in order to *diminish the demand* for new telephone service, appellant in September, 1941 filed a petition with the Commission (R. 32-40) asking permission to increase its existing "installation" charges and to establish a new "supersedure" charge in the Honolulu exchange area. Installation charges (also known as "connection" charges) are of two types—service connection charges for connecting a telephone instrument newly placed in a subscriber's premises, and reconnection charges for reconnecting a dead telephone instrument already in place in a subscriber's premises. A supersedure charge is for substituting a new subscriber for a prior subscriber at the same premises, where the

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by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discrimination between localities, or between users or consumers, under substantially similar conditions, to regulate the manner in which the property of every public utility is operated with reference to the safety and accommodation of the public, to prescribe its form and method of keeping accounts, books and records, and its accounting system, to regulate the return upon its public utility property, the incurring of indebtedness relating to its public utility business, and its financial transactions, and to do all things in addition which are necessary and in the exercise of such power and jurisdiction, all of which as so ordered, regulated, fixed and changed shall be just and reasonable, and such as shall provide a fair return on the property of the utility actually used or useful for public utility purposes." (Cont., p.5)

telephone instrument is not dead and is not reconnected (R. 19-20). Appellant asked permission to increase its service connection charges from $3.50 to $15, $10, or $7.50 depending on the type of station, to increase its reconnection charges from $1.50 to $10, $7.50 or $5 depending on the type of station, and to establish new supersedure charges of $5 for a business station and $3.50 for a residence station (R. 37-38).

The Commission approved appellant's request in its Decision No. 51 (R. 40-47), and in its Order No. 379 (R. 48-52) authorized appellant to place the new charges in effect as of October 1, 1941. In its Decision the Commission stated:

> "The Company makes no showing that such an increase of revenue is required, and we believe it improper to allow the increase to go through in a manner that would permit the in-

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The italicized words in the second sentence "upon its own motion, or upon complaint" were stricken out by an amendment to this section in 1947 (1947 Session Laws, Series A-69); otherwise, the quoted portions of this section have been the same since 1933.

Section 4724: "Any public utility violating or neglecting or failing in any particular to conform to or comply with any of the provisions of this chapter or any lawful order of the commission shall forfeit to the Territory not more than one thousand dollars for every violation, neglect or failure, to be recovered by action brought in the name of the Territory by the commission, and may be enjoined by the circuit court from carrying on its business while such violation, neglect or failure continues."

This section has been the same since 1933.

crease to be passed on to the common stockholders in the form of increased dividends.

"* * *

"The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an 'investment basis' would be a reduction from the net investment in arriving at a rate base. Investors would not require a return and subscribers would be spared paying a capital charge on same. On motion of the Commission or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted.

"* * *

"The Commission in approving the increase and establishment of said charges, does not intend that such approval is to be construed as a finding of reasonableness of such charges or practices and is of the opinion that said charges should be but temporary, and that withdrawal of such approval should be made at such time as the Commission deemed appropriate." (R. 45-46).

In its Order the Commission provided:

"The amounts representing the increase in connection charges and charges for supersedure of service over and above those which are now being charged by petitioner in the same respective categories and the newly established charges for supersedure of service where no charge has been previously made, shall be charged to Account No. 175, Contributions to Telephone Plant, the amounts so accruing to be segregated from other charges to said account." (R. 51).

The increased installation and new supersedure charges were put into effect as of October 2, 1941 (R. 21). On April 22, 1942, appellant filed with the Commission a petition in which it requested that the increased charges be terminated because the U. S. Army Signal Corps had established a system of priorities for telephone allocations and the increased charges were no longer necessary for their retarding effect (R. 21, 53-57). This petition stated that appellant had credited the amount of monies received on account of such increased charges to a subaccount entitled "175.2—Liability for Installation Charges" and that appellant believed that it should be permitted to recapture this amount as income in installments spread equally over a five-year period beginning with 1942 (R. 56-57).

The Commission by its Decision No. 57 and Order No. 406 terminated the increased charges as of May 1, 1942 (R. 58-64). The Commission denied appellant's request to recapture the amount of the increased charges as income because this did not appear to be "the proper method by which this amount should be accounted for after giving consideration to the purposes for which these monies were obtained from subscribers" (R. 61). The Commission decided that the accrued balance in subaccount No. 175.2 should, until further orders of the Commission, be considered as "Contribution to Telephone Plant" and be treated as a reduction of the net investment in arriving at a rate base, provided that "upon motion of the Commission or upon application of the Com-

pany at some future date, other disposition of the accrued balance in said account No. 175.2 might be made as conditions warrant" (R. 61). In its order the Commission provided that the amount of money collected through the increased charges "shall be retained in Sub-account No. 175.2 'Contributions to Telephone Plant' and shall not be taken into the income account until such time as the Commission may authorize such action" (R. 64).

For many years appellant has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by the Federal Communications Commission, which system was prescribed for appellant by the Public Utilities Commission effective January 1, 1938 (R. 22). Account No. 175, "Contributions of Telephone Plant" is one of the accounts listed on the liability side of the balance sheet in the Uniform System of Accounts (R. 65-68). In accordance with the Uniform System of Accounts, appellant customarily credited to account No. 175 contributions by subscribers for line extensions; such contributions have never been reported as income for Federal tax purposes and have never been taxed as income (R. 23).

The increased installation and new supersedure charges were collected by appellant from subscribers from October 2, 1941 to May 1, 1942, and, pursuant to the Order of the Commission, appellant credited amounts equal to such collections to a new subaccount No. 175.2 entitled "Liability for Installation Charges" (R. 23). This new subaccount was started

by appellant and maintained as a subaccount under the general account No. 175 "Contributions of Telephone Plant" in order that the amounts in subaccount 175.2 could be segregated from the other amounts in account No. 175, in accordance with the Commission's order (R. 23).

In 1941 appellant received $13,341.50 on account of the increased installation and new supersedure charges, and in 1942 appellant received $28,673.00 on account of said charges (this total of $42,014.50 was subsequently adjusted to $41,970.50 to correct an accounting error of $44.00) (R. 24).

Appellant's billings to its subscribers did not show the amount of the increased installation charges separately from previously existing installation charges and did not show the newly-established supersedure charges separately (R. 24-25). However, appellant maintained its accounting records so as to reflect the amount of the newly-increased installation charges separately from the previously existing installation charges and so as to reflect the newly-established supersedure charges separately (R. 25). All of the additional charges were credited to subaccount 175.2 "Liability for Installation Charges" and appellant maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could be refunded to individual customers if this were ever required (R. 25). The monies collected by virtue of the additional charges were intermingled with other monies in the

general treasury of appellant, but appellant at all times material to this case had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and new supersedure charges (R. 27).

Appellant maintains its records on the accrual basis and files its tax returns on the accrual basis for the calendar year. Appellant did not report the increased installation and supersedure charges received in 1941 and 1942 as part of its gross income in its tax returns for those years (R. 27). On November 2, 1943 the Internal Revenue Agent in Charge proposed deficiency assessments for 1941 and 1942 on the grounds of failure to include these charges in gross income. Appellant filed a protest with the Agent in Charge but the protest was denied and a determination of deficiency dated January 8, 1945 was sent to appellant. The deficiencies determined by the Commissioner of Internal Revenue on account of failure to include these charges in gross income were:

1941	Income Tax Liability		$ 1,978.47
	Excess Profits Tax Liability		6,959.35
1942	Declared Value Excess Profits Tax Liability		1,892.43
	Excess Profits Tax	$24,102.51	
	Less: 10% post war credit	2,410.25	21,692.26
Interest			4,205.88
	Total		$36,728.39

(R. 28).

Said additional taxes and interest in the total amount of $36,728.39 for both years were assessed and were paid by appellant on February 2, 1945 to

Fred H. Kanne, the then Collector of Internal Revenue for the District of Hawaii. Fred H. Kanne died prior to the time this action was commenced. Appellant filed claims for refund on December 6, 1946 for each year but the claims were disallowed by the Commissioner of Internal Revenue by notice of disallowance dated May 19, 1948 (R. 28-29).

During 1948 the Commission, following an application by appellant for an increase in rates, held a hearing on appellant's rates and charges (R. 29). Appellant did not suggest to the Commission at that time that any action be taken regarding subaccount 175.2, but the Commission on its own initiative as a part of its Decision No. 102 stated that the amount in this account should be transferred to appellant's "pension reserve"—meaning the "Retirement System of Mutual Telephone Company", a separate trust set up in 1931 to provide retirement benefits for appellant's employees (R. 29-31). Accordingly, the Commission's Order No. 598 entered August 7, 1948, provided that the amount of $41,970.50 carried in subaccount 175.2 be transferred by appellant to its "pension reserve" (R. 76-78). On December 3, 1948 appellant addressed a letter to the Commission outlining the tax difficulties that had arisen in connection with these additional charges and requested that the Commission suspend its order providing for the transfer of funds from subaccount 175.2. On December 22, 1948 the Commission replied that this matter should be held in abeyance by appellant pending formal

approval by the Commission. On February 24, 1949 the Commission advised appellant that it had denied appellant's request to suspend the transfer and ordered appellant to make the transfer in accordance with Order No. 598. On March 1, 1949 appellant deposited $41,970.50 in cash to the account of the "Retirement System of Mutual Telephone Company" in Bank of Hawaii (R. 31).

Thus, the question involved in this case is whether the increased installation and new supersedure charges were taxable income to appellant in 1941 and 1942, as contended by the Commissioner. Appellant contends first, that such charges were not taxable income to it in 1941 and 1942 because such charges were received and held in those years subject to a restriction and were not subject to appellant's "unfettered command".[3] Appellant also contends, in the alternative, that such charges are not taxable income to it in any year because such charges are not "income" within the meaning of the Sixteenth Amendment.

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[3]Appellant and the Commissioner have signed a consent to the assessment of income taxes for the year 1948 at any time on or before June 30, 1953 (Form 872). The income tax to appellant will be less if the additional charges are income in 1948 or 1949 rather than in 1941 and 1942 because the excess profits tax was not in effect in 1948 or 1949.

SPECIFICATION OF ERRORS

1. The District Court erred in making its conclusion of law that the increased installation and supersedure charges received by appellant from its subscribers in the calendar years 1941 and 1942 constituted income ascribable to and taxable in those years (R. 99).

2. The District Court erred in rendering and entering its judgment dismissing the complaint in this action (R. 100-101).

3. The District Court erred in holding that appellant received the increased installation and supersedure charges "under a claim of right" (R. 97).

4. The District Court erred in failing to hold that the increased installation and supersedure charges were not income to appellant in 1941 and 1942 because such charges were received and held in those years subject to a restriction and were not subject to appellant's "unfettered command".

5. The District Court erred in failing to hold that the increased installation and supersedure charges are not includable in appellant's gross income for 1941 and 1942, or in any other year, because they do not constitute "income" within the meaning of the Sixteenth Amendment.

SUMMARY OF ARGUMENT

I. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES RECEIVED BY APPELLANT FROM ITS SUBSCRIBERS IN 1941 AND 1942 WERE NOT TAXABLE INCOME TO IT IN THOSE YEARS BECAUSE SUCH CHARGES WERE RECEIVED AND HELD IN THOSE YEARS SUBJECT TO A RESTRICTION AND WERE NOT SUBJECT TO APPELLANT'S UNFETTERED COMMAND.

In *North American Oil Consolidated* v. *Burnet* 286 U.S. 417, 52 S. Ct. 613 (1932), the Supreme Court established the rule that "if a taxpayer receives earnings under a claim of right *and without restriction as to its disposition*, he has received income which he is required to return" (emphasis supplied). Similarly, in the earlier case of *Corliss* v. *Bowers*, 281 U.S. 376, 50 S. Ct. 336 (1930), the court said that "income that is subject to a man's *unfettered command* and that he is free to enjoy at his own option may be taxed to him as his income" (emphasis supplied). In the present case it is clear that the additional charges were received by appellant in 1941 and 1942 subject to the restriction imposed by the Commission that they were to be segregated and held in subaccount No. 175.2 and that they were not subject to appellant's "unfettered command" at that time—indeed, the Commission retained "unfettered command" over such additional charges until 1948. Furthermore, appellant did not receive such additional charges under a "claim of right" because it did not make any claim to retain them at the time it received them.

II. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES ARE NOT TAXABLE INCOME TO APPELLANT IN 1941 AND 1942, OR IN ANY OTHER YEAR, BECAUSE THEY DO NOT CONSTITUTE "INCOME" WITHIN THE MEANING OF THE SIXTEENTH AMENDMENT.

The additional charges were in the nature of contributions to appellant from its subscribers, which are similar to a governmental subsidy or donation or to contributions by customers to a utility for line or spur extensions, none of which are considered taxable income to the recipient. *Edwards* v. *Cuba Railroad*, 268 U.S. 628, 45 S. Ct. 614 (1925); *Liberty Light & Power Co.*, 4 B.T.A. 155 (1926) (Acq.); *Aransas Compress Co.*, 8 B.T.A. 155 (1927) (Acq.); *Great Northern Railway Co.*, 8 B.T.A. 225, 271 (1927) (Acq.) *aff'd.* 40 F. 2d 372; *Baltimore & Ohio Railroad Co.*, 30 B.T.A. 194, 199 (1934) (Acq.).

ARGUMENT

I. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES RECEIVED BY APPELLANT FROM ITS SUBSCRIBERS IN 1941 AND 1942 WERE NOT TAXABLE INCOME TO IT IN THOSE YEARS BECAUSE SUCH CHARGES WERE RECEIVED AND HELD IN THOSE YEARS SUBJECT TO A RESTRICTION AND WERE NOT SUBJECT TO APPELLANT'S UNFETTERED COMMAND.

A. Governing Principles

The allocation of income to the proper year is a subject which has given rise to countless tax cases. Although no case has been found with the same facts as the case at bar, we believe that under the governing principles it is clear that the income[4] from the additional charges *cannot* be allocated to the years 1941 and 1942.

There should be no dispute about the governing principles. The rule is clearly stated in the oft-quoted language of Mr. Justice Brandeis in *North American Oil Consolidated* v. *Burnet*, *supra*, at page 424:

> "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the

[4]In this section of the argument it is assumed that the additional charges constitute taxable income to appellant in some year.

> money, and even though he may still be adjudged liable to restore its equivalent."

In this case the question was whether the sum of $171,000 received by the company in 1917 was taxable to it as income in that year. The company had operated a section of oil land which was claimed by the government and on February 2, 1916 the government had secured the appointment of a receiver to operate the property and hold the net income thereof. The $171,000 represented the net profits which had been earned from the property in 1916 during the receivership. In 1917 the District Court entered a final decree dismissing the government's appeal and the money was paid over by the receiver to the company. The government took an appeal to the Circuit Court of Appeals for the Ninth Circuit and in 1920 that court affirmed the decree; in 1922 a further appeal to the Supreme Court was dismissed by stipulation. The Supreme Court held that the profits were not taxable to the company in 1916, because the company was not required in 1916 to report as income an amount which it might never receive, but that profits became income to the company in 1917, when it first became entitled to them and when it actually received them.

The absence of a restriction on disposition as a test of taxable income is illustrated by the holding of Mr. Justice Holmes in the earlier case of *Corliss* v. *Bowers*, *supra*. In this case the court held that income from a revocable trust was taxable to the grantor and stated, at page 378:

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."[5]

The rule that the *absence* of a restriction on the disposition, use or enjoyment of property means that it is income has been reaffirmed many times. See *Brown* v. *Helvering*, 291 U.S. 193, 54 S. Ct. 356 (1934); *United States* v. *Lewis*, 340 U.S. 590, 71 S. Ct. 522 (1951). It is obvious from the mere statement of the rule that if there is a *restriction* there can be no income—if the Supreme Court had meant that mere receipt of money constitutes income, whether or not under a restriction, the recitation of the qualifying phrase is meaningless. See *Sohio Corporation* v. *Com'r*, 163 F. 2d 590, 593 (D.C. Cir., 1947).

Another statement of the same rule is made in the recent case of *Rutkin* v. *United States*, 342 U.S. 808,—S. Ct.—, 20 Law Week 4231 (1952), holding that money obtained by extortion is income taxable to the extortioner:

> "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. *Burnet* v. *Wells*, 289 U.S. 670,

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[5]"The 'use and enjoyment' of income is a vital fact * * *. See Corliss v. Bowers * * * where these factors were considered important as justifying a tax. The converse should be true." 2 Mertens, *Law of Federal Income Taxation*, p. 307 and n. 93.

> 678; *Corliss* v. *Bowers*, 281 U.S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it."

This court has recognized that sums required to be placed in a particular account or otherwise earmarked or restricted may not be income. *Baboquivari Cattle Co.* v. *Com'r*, 135 F. 2d 114 (9th Cir., 1943) involved payments by the United States to a ranching corporation in accordance with the Soil Conservation and Domestic Allotment Act. The company built reservoirs, dams, fences and similar improvements on its ranch and presumably complied with the range-improvement practices of the government. The company contended the payments were capital subsidies, not income, but this court held them income, stating:

> "No part of the sums paid to the petitioner were required to be placed by him in a particular account or fund. The payments were not earmarked, nor was there any restriction on their use. Petitioner was free to use the money for any purpose it might see fit, as to defray operating expenses or to pay dividends or to purchase an automobile." (116)

If the cattle company had been required by the government to segregate and hold its conservation payments in a particular account (as appellant was required to segregate and hold the additional instal-

lation and supersedure charges) it is apparent that this court would not have thought them income.

The general principles gained from these decisions are that earnings cannot be considered income unless: (1) the taxpayer receives the earnings under a claim of right *and* (2) the taxpayer receives the earnings without restriction as to their disposition, subject to his unfettered command, and with freedom to dispose of them at will.

It remains to apply these principles to the facts of the case at bar.

B. "Claim of Right"

In the first place, it is our contention that appellant did not receive the increased installation and new supersedure charges under a "claim of right" and that there is nothing in the record to support the District Court's holding that appellant did receive them under a claim of right (R. 97). In its petition to the Commission for authority to impose these charges, appellant did not assert that it required them as additional revenue or that it would be entitled to keep them (R. 36-39, 45-46). It wished the charges to be imposed in order to discourage demands for new telephone service in Honolulu. With respect to *disposition* of the amounts realized from the additional charges, appellant merely suggested in its petition that it be required to keep such amounts in a separate account, "the disposition of which may be determined at a later date" (R.

39), and the Commission's order so provided (R. 51). Appellant's feeling about its "right" to these charges is evidenced by its entry of them in an account which it entitled "Liability for Installation Charges" (R. 23) and by the manner in which it kept its records so that the additional charges could have been refunded exactly to the individual subscribers who paid them (R. 25). In its petition to terminate the additional charges in April 1942, appellant attempted *for the first time* to establish a "right" to them (R. 56-57), but this was rejected by the Commission (R. 60-61), which ordered that the additional charges should be retained in subaccount 175.2 (R. 64). Until the Commission's order of August 7, 1948 (R. 76-78) appellant did not know what would become of these additional charges, and it did not receive them under a "claim of right" in 1941 and 1942. The fact that the collection of the additional charges was authorized by the Commission does not mean that appellant claimed a "right" to them. In *Sohio Corporation* v. *Com'r*, *supra*, the taxpayer was authorized by state law to withhold from its vendors and retain a portion of the purchase price of oil bought from them (this was treated by the court as a "collection" of this amount from the purchasers—p. 591), but it was held that the amount withheld was not income to the taxpayer because not received under a "claim of right", the taxpayer having protested that the law was invalid.

C. Restriction on Disposition

Irrespective of whether appellant received the additional charges under a "claim of right", it is clear that it did not receive them "without restriction as to their disposition", subject to its "unfettered command", and with freedom to dispose of them at will. This second test of taxable income is *in addition to* the "claim of right" test and is equally important.[6]

Appellant is a utility subject to the jurisdiction of the Commission with respect to its rates and charges and its accounting system and is subject to a penalty of $1,000 and an injunction against carrying on its business for violating or neglecting or failing *in any particular* to conform to or comply with any lawful order of the Commission (n. 2, *supra*). The additional charges could not have been imposed in the first place without the order of the Commission, and the Commission certainly had the right to impose the restriction that they must be segregated and held in subaccount No. 175.2.[7]

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[6]"The Treasury and the lower courts have been inclined to forget the second qualification made by the Supreme Court. The income must not only be received under a claim of right, but it must be received *without restriction.* (North American Oil Consolidated v. Burnet)." I Montgomery's *Federal Taxes, Corporations and Partnerships*, 1951-52, 11.

[7]For a general discussion of the powers of federal and state public service commissions over the accounting practices of public utility corporations see I. R. Barnes, *The Economics of Public Utility Regulation*, Crofts, N.Y. 1942, where it is stated: "The control of utility accounts is one of the cornerstones

The Commission made it clear that the amounts in subaccount No. 175.2 could not be taken into appellant's income account or be passed on to its common stockholders as dividends (R. 45, 64). It should be pointed out, however, that the restriction was actually more severe than this—an amount equal to the additional charges collected must be segregated and credited to subaccount No. 175.2 and retained therein until further order of the Commission.

What did this mean as a practical matter? It meant that appellant could not actually obtain any benefit or use from the additional charges at all because it has to be prepared at any moment to pay out an amount in cash equal to the amount credited to subaccount 175.2 for any purpose the Commission might direct, just as in 1949 it had to deposit $41,970.50 in cash in Bank of Hawaii to the account of the Retirement System. The Commission might have directed that the charges be repaid to the subscribers who paid them or be turned over to the Commission or be applied for the benefit of the subscribers as a whole. If the Commission had held to its original intention it probably would have directed that the amount in subaccount No. 175.2 be retained permanently as a capital contribution and deducted

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on which the contemporary scheme of regulation is built." (p. 242) The broad powers of public service commissions over accounting are also indicated by *A. T. & T. Co.* v. *United States*, 299 U.S. 232, 57 S. Ct. 170 (1936) upholding the power of the Federal Communications Commission to prescribe a uniform system of accounts for telephone companies.

from appellant's net investment in plant (R. 46, 61)—in other words, this amount would be treated exactly as subscribers' contributions for line extensions and would never have been taxed to appellant as income at all (R. 23); *Edwards* v. *Cuba Railroad, supra; Liberty Light & Power Co., supra,* and other cases cited in the second section of this argument.

At the time it received the additional charges, appellant had no reason to expect it would be allowed to retain them itself. Appellant had conceded and the Commission had expressly found that appellant was not entitled to the additional charges as an increase in revenue (R. 45-46), and the Commission provided that its approval of the charges was not to be construed as a finding of their reasonableness (R. 46). A utility is not entitled to earn from the public more than a reasonable rate of return (Sec. 4715, R.L.H. 1945, n.2, *supra*), and appellant could hardly have resisted an order of the Commission to repay the additional charges when it could establish no right to them in the first place as necessary to enable it to earn a fair return on its public utility property within the meaning of the statute (Section 4715, *supra*, provides that a utility shall charge rates which are "just and reasonable" and shall be entitled to earn a "fair return" on its utility property). At the time of its application to terminate the additional charges in April, 1942 appellant attempted to "recapture" them as income, but this was rejected by the Commission (R. 56-57, 60-61).

Until 1948 appellant had no command whatever, fettered or unfettered, over the amounts in subaccount 175.2 and held them subject to complete restrictions as to their use, disposition and enjoyment. In effect, the Commission had impounded the $41,970.50, in the custody of appellant, until 1948 and itself retained "unfettered command" of these amounts until that time. Certainly appellant was not in 1941 and 1942 free to enjoy these amounts at its own option (*Corliss* v. *Bowers*, *supra*) or free to dispose of them at will (*Rutkin* v. *United States*, *supra*). As a "practical matter" appellant derived no "readily recognizable economic value" (*Rutkin* v. *United States*, *supra*) from the additional charges until 1948 or 1949.

The restriction imposed by the Commission was not merely one of the "niceties of accounting technique" or part of the "jargon of bookkeeping" as the District Court seemed to believe (R. 97). During the period prior to August 7, 1948, appellant could have made no more use of the $41,970.50 than if it had been placed in escrow or locked up in a bank subject to the Commission's order. True, appellant received the actual physical currency and mingled it with its other receipts and used all of its currency without regard to source, but at the same time it always had to have on hand an equivalent amount of cash or marketable securities which could be paid out as the Commission ordered.[8] Appellant could not have

[8]The stipulation of facts states that appellant "at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and new supersedure charges" (R. 27).

"borrowed" from the fund without substituting an equivalent amount of marketable securities. If appellant had failed to keep on hand cash (or assets readily convertible into cash) sufficient to cover the amount entered in subaccount 175.2 it would have been in violation of the Commission's order. The Commission's purpose obviously was to require appellant to segregate the amount of the additional charges in a liability or suspense account so that money equal to this amount could be paid out by appellant at any time for any purpose the Commission saw fit to direct. Under these circumstances, the possession and use of the physical currency was of no significance to appellant.

D. Intermingling of Funds

It would be unduly technical and would exhalt form above substance to make the result in this case depend upon the segregation of the physical currency. Suppose, for example, that appellant had cashed each subscriber's check, taken currency equal to the amount of the additional charges, and placed that currency in a safe in the office of the Commission. Perhaps the Commission could have made such a requirement, but with a responsible public utility company it would have been absurd to do so. The Commission achieved the same result by ordering appellant to segregate and hold the charges in subaccount 175.2, and appellant received in 1941 and 1942 no more and no less benefit from the charges

than it would have received if the currency had been placed in a safe in the Commission's office.

The principle that the substance of a transaction rather than its mere form controls the determination of tax liability is too well-established to require much comment.[9] In several recent cases involving the receipt of monies which the taxpayer was not necessarily entitled to keep, the tax court has held that the fact that such monies were intermingled without distinction with the other funds of the taxpayer and were used without regard to their source did not make such monies "income"—in other words, the fact of intermingling or use of the physical currency by the taxpayer is immaterial. *Seven-Up Co.*, 14 T.C. 965 (1950) (Acq.); *Broadcast Measurement Bureau, Inc.*, 16 T.C. 988 (1951) (Acq.); *Bates Motor Transport Lines, Inc.*, 17 T.C. No. 18 (1951) (Acq.). The Commissioner of Internal Revenue has acquiesced in each of these decisions.

The fact that segregation on the books of the taxpayer rather than physical segregation of the money or deposit of the same with a third party is sufficient to keep the segregated sums out of income is illustrated by the title insurance company "unearned premium" cases. *Early* v. *Lawyers Title Ins. Corporation*, 132 F. 2d 42 (4th Cir., 1942), deals

[9]"The incidence of taxation depends upon the substance of a transaction", *Comm'r* v. *Court Holding Co.*, 324 U.S. 331, 334, 65 S. Ct. 707 (1945); I Montgomery's *Federal Taxes, Corporations and Partnerships*, 1951-52, 322.

with a Virginia corporation required by state law to set up 10% of its original title insurance premiums as a reserve for unearned premiums. There was no requirement of segregating the physical monies or placing the money in the hands of a third party. It was only necessary for the title insurance company to establish a reserve on its books. The court held that the amount of the reserve should be treated as unearned premiums and need not be included in taxable income until released from the reserve.

> "The passage of the Virginia statute [requiring segregation of the unearned premium reserve] unquestionably resulted in funds to the amount of the reserve at the end of the year being withdrawn from the unfettered control of the company and being held in trust for the benefit of contract holders; and the practical effect of this was to decrease by such amount the income of the year available for ordinary purposes." (p. 46)

A similar case is *Title & Trust Co.*, 15 T.C. 510 (1950), recently affirmed by this court *per curiam* in 192 F. 2d 934 (9th Cir., 1951). Complying with the directive of the Oregon Insurance Commissioner issued pursuant to the Oregon statute, the taxpayer segregated from its 1945 premium income an amount equal to 3% of its total premiums in 1942-1945 as an unearned premium reserve. The tax court held that the taxpayer properly excluded this reserve from its 1945 premium income. It is obvious from a statement of the facts that the taxpayer did not

physically segregate the monies but merely set up on its books an account captioned "unearned premiums". The tax court held that in effect that by the action of the taxpayer taken pursuant to the directive of the Insurance Commissioner, the reserve was taken from income and thus made "unavailable to the company for general corporate uses" (p. 516-517).

In the cases referred to in paragraphs 2, 4, 5, 6, 7, 8 and 9 (*Portland Cremation Ass'n, infra*) of Section F, below, the physical funds were in the possession and control of the taxpayer and mingled with his other monies and were or could have been used by the taxpayer without regard to their source, but because of various restrictions were held not to be income in the year of receipt.

All of these authorities show that the fact of intermingling of the additional charges with the other monies in appellant's general treasury is immaterial in determining whether the additional charges were income to appellant in 1941 and 1942.

E. Obligation to Repay

We recognize that the contingent obligation of appellant to *repay* the additional charges would not be sufficient to keep them out of income in the year received under the decision in *North American Oil Consolidated* v. *Burnet, supra,* and cases following it.[10] The distinction is that the taxpayer in those

[10]For instance, *Comm'r* v. *Alamitos Land Co.*, 112 F. 2d 648 (9th Cir., 1940), *cert. denied* 311 U.S. 679, where the court found that the taxpayer had "absolute dominion" over the fund received under a judgment entered in 1932 which was subsequently appealed and reversed.

cases received the money and during the period before the ownership was finally determined could do with it absolutely as it pleased. The money could have been passed on to its stockholders in the form of dividends (North American Oil Consolidated entered the earnings from the property in 1916 on its books as "income"—286 U.S. 421) or used for any other purpose, just like all of its other income. Appellant, on the other hand, could not and did not take the $41,970.50 into its income account (R. 64, 23)—this amount did not go to swell the surplus from which dividends could be declared and did not become part of ordinary income which could be used for general corporate purposes. The amount was entered and held in a liability or suspense account under the order of the regulatory commission (R. 23), which meant that an equal amount of cash or marketable securities had to be kept on hand at all times to be paid out under the direction of the Commission. Neither the stockholders nor the company had any economic benefit from these additional charges in 1941 and 1942, and might never have had any economic benefit therefrom if the Commission had not ordered the transfer of the funds out of subaccount 175.2 in 1948.

F. Cases Illustrative of Receipts under a Restriction

Although no case has been found with facts the same as the case at bar, the following cases are illus-

trative of the rule that funds received subject to a restriction as to their use or disposition or not subject to the "unfettered command" of the recipient do not constitute income when received:

1. Payments received or impounded in escrow or in court or in a bank account are not required to be included in taxable income until released from custody, even though the payments have already been earned. *McLaughlin* v. *Comm'r*, 113 F. 2d 611 (7th Cir., 1940); *London-Butte Gold M. Co.* v. *Comm'r*, 116 F. 2d 478 (10th Cir., 1940); *Leedy-Glover Realty & Insurance Co.*, 13 T.C. 95 (1949) (Acq.); *Estate of Dick W. Paul*, 11 T.C. 148 (1948) (Acq.); *Merton E. Farr*, 11 T.C. 552 (1948) (Acq.), *aff'd* 188 F. 2d 254 (6th Cir., 1951); *Estate of Margaret McAllen Fairbanks*, 3 T.C. 260 (1944) (Acq.); *E. P. Madigan*, 43 B.T.A. 549 (1941) (Acq.); *Sara R. Preston*, 35 B.T.A. 312 (1937) (Acq.); *Gibbs & Hudson, Inc.*, 35 B.T.A. 205 (1936) (Acq.).

2. Amounts received by a manufacturer of soft drinks from its dealers as a fund to be expended solely in a national advertising campaign, which were not expended before the close of the taxable year, were held not to be income because the funds were not received without restriction. The manufacturer was a conduit to pass the funds along to the advertising agency. The commingling of the fund with the general revenues of the manufacturer is immaterial. *Seven-Up Co., supra.* This case was followed in *Broadcast Measurement Bureau, Inc.*,

supra, where the court held that subscription fees to the Bureau to finance broadcasting studies were not received under a claim of right and without restriction as to their disposition, despite the fact that there was no definite, unconditional obligation on the Bureau to refund any of the fees at the end of the fiscal year since the study was not closed.

3. Where a contract of sale provides for withholding or deposit of part of the consideration as a guarantee of the seller's representations and such amount is not to be released until a subsequent year, the amount withheld or deposited is *not* to be included in the seller's income in the year of the sale. *Preston R. Bassett*, 33 B.T.A. 182 (1935), *aff'd* without opinion, 90 F. 2d 1004 (2nd Cir., 1937); *Comm'r* v. *Cleveland Trinidad Paving Co.*, 62 F. 2d 85 (6th Cir., 1932); *Stoner* v. *Comm'r*, 79 F. 2d 75 (3rd Cir., 1935), *cert. denied* 296 U.S. 650. In the *Stoner* case stock of a water company was sold under an agreement whereby the seller agreed to deduct from the purchase price $50,000 and to deposit said sum in a bank of the seller's choosing in an account to be known as an "Indemnity Account" for two years, the fund to be used to pay unknown liabilities of the water company which might be disclosed after the sale. In fact no such liabilities arose and the entire $50,000 was paid to the seller at the end of the two years. The court held that the income tax law was concerned only with *realized gains* and that the $50,000 was not realized gain until the end of the two-year period. The taxpayer had only qualified possession and control of the fund until then.

4. Deposits with the seller by the purchaser on contracts to purchase property which are conditional and subject to being nullified by an adverse finding of title or inability to deliver possession are not income in the year received but in the subsequent year when the transaction is closed despite the fact that the seller has physical control of the money in the earlier year. *Veenstra & De Haan Coal Co.*, 11 T.C. 964 (1948) (Acq.); *Baird* v. *United States*, 65 F. 2d 911 (5th Cir., 1935), *cert. denied* 290 U.S. 690.

5. Advance rental received by the lessor to be held as security for performance by the lessee and to be applied on the last rental payment if not otherwise used, is not income of the lessor in the year of receipt despite physical possession of the money by the lessor in that year. "* * * though the money is rightfully received, and if the parties so intend may be freely used, yet because of the acknowledged liability to account for it, there is no gain; just as in borrowing there is none." *Clinton Hotel Realty Corp.* v. *Comm'r*, 128 F. 2d 968, 969 (5th Cir., 1942). A similar result was reached in *Warren Service Corp.* v. *Comm'r*, 110 F. 2d 723 (2nd Cir., 1940), where $125,000 was deposited with a lessor in 1926 as security for the lessee's performance, with an obligation of the lessor to repay it in 1941 unless there had been a default in the meantime.

6. Unclaimed deposits and overpayment for gas by former customers were income when credited to surplus and made so available to the general use of the corporation and not in the year received from

the customers. *Boston Consol. Gas Co.* v. *Comm'r*, 128 F. 2d 473 (1st Cir., 1942). In this case the deposits and overpayments were made over a period of 30 years and carried on the books of the company as a liability, and in 1935 the company transferred the unclaimed amounts to its profit and loss (surplus) account. The court held that these amounts were income in 1935. The deposits and overpayments were in the physical control of the company from the time they were made.

7. Unclaimed deposits on cases and bottles required of customers by a beverage company became income when the balance of old deposits in the account was transferred to surplus by the company. *Wichita Coca Cola Bottling Co.* v. *United States*, 152 F. 2d 6 (5th Cir., 1945), *cert. denied* 327 U.S. 806. The deposits were credited to a special liability account. The funds deposited were in the physical control of the company from the time the deposits were made. The court held that the "financial act" of transferring the amounts in the account to "free surplus funds" created income in the year in which the act was done. In *Farmers Creamery Co.*, 14 T.C. 879 (1950) the tax court held that bottle deposits recorded in a liability account were not income to the taxpayer in the years received.

8. In *Decatur Water Supply Co.* v. *Comm'r*, 88 F. 2d 341 (7th Cir., 1937), a city created a corporation to finance an addition to its water works system. Under the corporation's charter and agreement between it and the city, 90% of the net water rents

were to be paid by the city to the corporation and used by it in paying operating expenses and the dividend on its preferred stock and retiring the preferred stock. The court held that the amounts received by the corporation from the city as water rents which were used to retire the preferred stock were not income of the corporation but a restoration of capital. From the time of the receipt of the water rents by the corporation a fund was earmarked for a single purpose—the return of capital to the preferred stockholders. The company had no freedom of disposal and the rents had no exchange value because of the restrictions attached to their receipt.

9. That portion of the selling price of cemetery lots which the corporation engaged in selling such lots is required by its sales contracts to segregate, and which it does segregate as a trust fund for the perpetual maintenance of such lots, is not taxable income. *Portland Cremation Ass'n* v. *Comm'r*, 31 F. 2d 843 (9th Cir., 1929); *Woodlawn Cemetery Association*, 28 B.T.A. 882 (1933); *American Cemetery Co.* v. *United States*, 28 F. 2d 918 (Dist. Ct. Kan., 1928). The decision of this court in *Portland Cremation Ass'n* v. *Comm'r* is of particular interest because the funds set aside were actually retained in the physical possession and control of the cemetery company and the income therefrom mingled with the general funds of the company. The maintenance fund was so free from outside constraint that the taxpayer might borrow from it at will and limit its amount at will. "While the petitioner here may be said to have had control of the money which it had

placed in the maintenance fund, diversion of that fund for corporation purposes * * * might be enjoined by a suit in equity as a violation of the trust agreement." (p. 846).

G. Decision of District Court

In its opinion the District Court below appears to have somewhat confused the two issues in this case, viz.: *first*, that the additional charges do not constitute income in 1941 and 1942 because they were not received under a claim of right and without restriction as to their disposition, and *second* that the additional charges do not constitute income in any year because they are not "income" within the meaning of the Sixteenth Amendment.

The District Court did hold that appellant received the additional charges under a claim of right (R. 97), a conclusion which we believe is not supported by the record (argument, pp. 20-21, *supra*). However, the District Court apparently took no cognizance of the additional requirement laid down by the Supreme Court in *North American Oil Consolidated* v. *Burnet*, *supra*, viz., that earnings must be received *without restriction* as to their disposition in order to be taxable income. The presence of a restriction, in the form of a binding order of the regulatory commission to segregate and hold the additional charges in subaccount 175.2, is the principal reason advanced by appellant to support its contention that the additional charges were not income in 1941 and 1942.

The authorities cited by the District Court are as follows:

North American Oil Consolidated v. *Burnet*, *supra*. We agree with the rule announced in this case and point out that there was no restriction whatever on the disposition of the disputed earnings paid over to the company in 1917—the company could have used this money to pay dividends or for any other purpose.

Comm'r v. *Wilcox*, 327 U.S. 404, 408, 66 S. Ct. 546 (1946). This case merely holds that an embezzler does not receive money he embezzles under a "claim of right" and therefore does not have taxable income therefrom under the rule of *North American Oil Consolidated* v. *Burnet*, *supra*.

United States v. *Lewis*, 340 U.S. 590, 591, 71 S. Ct. 522 (1951). This case also affirms the rule of *North American Oil Consolidated* v. *Burnet* and holds that a taxpayer who receives an excessive bonus ($22,000) under the mistaken idea that he was entitled to it, must treat it as income in the year received even though he had to return it in a subsequent year. However, the court found that the taxpayer had in the year of receipt "at all times claimed and used the full $22,000 unconditionally as his own, in the good faith though 'mistaken' belief that he was entitled to the whole bonus". (591) Since there was no *restriction* on the use or disposition of the money which had been received under a claim of right it is obvious that it was income in the year received under *North American Oil Consolidated* v.

Burnet. The presence of a claim of right and the complete absence of a restriction on use distinguish this case from ours.

Comm'r v. *Brooklyn Union Gas Co.*, 62 F. 2d 505, 506 (2nd Cir., 1933). A gas company and five wholly-owned subsidiaries engaged in rate litigation obtained an interlocutory order from the court staying execution of reduced rates ordered by New York Public Service Commission in 1916 and directing that monies collected in excess of the reduced rates be impounded in a bank. In 1919 the excess monies so impounded in Rate Cases No. 1 were withdrawn by the companies, pursuant to court order, upon the giving of a bond for repayment to the bank in the event that the reduced rates should finally be sustained. (The "bond" was merely a bond of each of the subsidiary companies with the parent company as "surety"—see findings of facts in the opinion in this case by the Board of Tax Appeals, 22 B.T.A. 507, 510.) The purpose of the withdrawal order was to enable the company to "obtain and use" the monies deposited during the pendency of the proceeding. In 1922 the Public Service Commission retroactively abrogated its orders reducing the rates. The Commissioner attempted to tax the impounded monies as income in 1922. The companies contended the monies were income when earned—that is, when it furnished the gas. The Board held the Commissioner was in error and that the excess monies represented income properly accruable in the years in which the service was rendered and the charges

made therefor. 22 B.T.A. 507, 526. In a somewhat confusing opinion, the Court of Appeals of the Second Circuit affirmed the order of the Board, although the court thought that under the rule of *North American Oil Consolidated* v. *Burnet* the excess monies were not income in the years earned but rather in 1919, the year they were released from impoundment. The rationale of this decision would tend to support our contention that the increased installation and new supersedure charges were not income when the installations and supersedures were made (1941 and 1942) but rather when the Commission removed the restriction on their use and disposition and in effect released them from impoundment in subaccount 175.2. The court thought that the excess money was income in the year it was released from impoundment because in that year it was "received by the companies without restriction upon its use" (506). The contingent liability to repay "imposed no restriction upon their use of the money actually in their hands" (506). The fact that the companies had to give their own bonds to get the money did not add anything to the contingent liability they were under regardless of such bonds (506). This holding appears to conform to *North American Oil Consolidated* v. *Burnet*. The requirement that each company must give its own bond with its parent as surety is not a "restriction" on use because it subjected the company to no liability it was not under anyway. The company was not forbidden to pass the excess money on to its stockholders or required to keep an equivalent

amount of cash or securities on hand to repay the bank.

Gilken Corporation v. *Comm'r*, 176 F. 2d 141, 145 (6th Cir., 1949) held that money received by a lessor from its lessee as advance rental, as security for performance, and as part payment of the purchase price should the lessee exercise its option to buy, was income to the lessor when received even though he might subsequently have to return its equivalent, *because* the money had been paid over without any restriction on its use. "The taxpayer was not required to hold the money in trust, or to put it apart as a separate fund in any manner whatsoever" (144). "Here, the taxpayer had the free and unrestricted use, enjoyment and disposition of the advance rental payments during the taxable years in which received * * *" (145). This case is clearly within the rule of *North American Oil Consolidated* v. *Burnet* and clearly distinguishable from the case at bar where there is a substantial restriction imposed by the regulatory authority. Indeed we would consider that the Court of Appeals of the Sixth Circuit would be bound by the principles announced in the *Gilken* case to decide the case at bar in favor of appellant because of the presence of the restriction on use in 1941 and 1942.

Weiss v. *Wiener*, 279 U.S. 333, 335, 49 S. Ct. 337 (1929) is cited by the District Court for a general statement of Mr. Justice Holmes that the income tax laws do not profess to embody perfect economic theory. The case holds that a lessee is not entitled

to a deduction for estimated obsolescence of buildings where he had made no expenditure on this account. The case does not deal with the question of whether receipt of money under a restriction as to its disposition constitutes income.

Helvering v. *Midland Mut. L. Ins. Co.*, 300 U.S. 216, 225, 57 S. Ct. 423 (1937) is presumably cited as confirming the general statement in *Weiss* v. *Wiener*, *supra*. The case held that a mortgagee which bids in successfully at a foreclosure sale for the principal of its loan plus interest, received "income" to the extent of the interest. The case has no relation to questions at issue in the case at bar.

Comm'r v. *Union Pac. R. Co.*, 86 F. 2d 637, 639 (2nd Cir., 1936) held that a taxpayer on the accrual basis is taxable on the gain from land sold on an installment contract in the year the contract was made rather than in the years when the payments are made. Again, this issue is different from that in the case at bar.

Board v. *Comm'r*, 51 F. 2d 73, 75 (6th Cir., 1931). This case held that a director of a corporation, who received in 1920 $18,130.66 as his share of profits from a pipe line he constructed and sold to the corporation, was required to report such sum as taxable income in that year despite the fact that his claim to the money was perhaps illegal because of his position as director (stockholders filed action to recover the money) and he might have to return it. (In 1927 a compromise was reached whereby he was able to retain the money.) It is obvious from the facts that

there was no *restriction* whatever on the taxpayer's use or disposition of the money in 1920. Although this case preceded *North American Oil Consolidated* v. *Burnet*, the result is consistent with it because of the absence of a restriction in both cases. The Court of Appeals of the Sixth Circuit now recognizes that the absence of a restriction is a determinative factor in deciding whether "income" has been received (*Gilken Corporation* v. *Comm'r*, *supra*).

Penn v. *Robertson*, 115 F. 2d 167, 175 (4th Cir., 1940) held that where a New Jersey corporation had sold stock to a director in 1929 under a stock allotment plan not approved by the stockholders which provided for the application of dividends from the stock and credits from an employees' bonus on the purchase price, amount so applied in 1930 was income in that year notwithstanding that the plan was void (not having been approved by the stockholders) and was rescinded in 1931. The court held that the money had been constructively received by the taxpayer in 1930 under a claim of right *and without restriction* (he could have paid the portion of his note not covered by the dividends and bonus and taken up the stock at any time—pp. 174, 175). Thus, this was another case when money was received *without restriction* and is clearly distinguishable from the case at bar.

H. Annual Accounting

We concede that the requirements of the federal fisc require annual tax returns and accounting

(*Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 51 S. Ct. 150 (1931); *Security Flour Mills Co.* v. *Comm'r*, 321 U.S. 281, 64 S. Ct. 596 (1944); *Penn* v. *Robertson, supra*) so that income must be determined at the close of the fiscal year without regard to the effect of subsequent events. However, we point out that if at the close of the fiscal year the money is held *subject to a restriction* and not subject to the taxpayer's *unfettered command* or *freedom to use it at his option*, the money is not "income" for that year under the annual system of accounting or any other (*North American Oil Consolidated* v. *Burnet, supra; Corliss v. Bowers, supra; Rutkin* v. *United States, supra*). In the case at bar, at the close of the fiscal years 1941 and 1942 appellant held the additional charges subject to the restriction that it could not use them for any purpose whatever—that is, as a regulated utility company it had to have on hand at all times an equivalent amount available to be paid out for any purpose the Commission might direct. What happened subsequent to the close of the fiscal year is of no significance in determining the taxable status of the additional charges in 1941 and 1942 (*Penn* v. *Robertson, supra* at 175).

II. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES ARE NOT TAXABLE INCOME TO APPELLANT IN 1941 AND 1942, OR IN ANY OTHER YEARS, BECAUSE THEY DO NOT CONSTITUTE "INCOME" WITHIN THE MEANING OF THE SIXTEENTH AMENDMENT.

This is an alternative argument to that advanced in Section I—that is, if the additional charges are not to be considered as sums received by appellant subject to a restriction and thus not includable in its taxable income in the years received, such additional charges should be considered as similar to contributions by subscribers for line extensions and thus not includable in taxable income at all.

The Sixteenth Amendment provides that the Congress shall have power to lay and collect taxes on "incomes" from whatever source derived. The power of the Congress to tax is limited by the Sixteenth Amendment and the Congress cannot tax as income what in fact is not income. *Eisner* v. *Macomber*, 252 U.S. 189, 40 S. Ct. 189 (1920).

In the well-known case of *Edwards* v. *Cuba Railroad*, 268 U.S. 628, 45 S. Ct. 614 (1925), the Supreme Court held that a subsidy granted to the railroad by the Cuban government ($6,000 per kilometer of road built) did not constitute "income" within the meaning of the Sixteenth Amendment. This case was followed by the Board of Tax Appeals in determining that payments made by customers to a utility to secure line extensions to their property, do not constitute income to the utility. This re-

sult follows whether the customers erect the line and give it to the utility, or the utility erects it and is compensated for its cost by the customers. This rule has been uniformly established for many years and the Bureau of Internal Revenue has acquiesced in these decisions. See *Liberty Light & Power Co.*, 4 B.T.A. 155 (1926) (Acq.); *Rio Electric Co.*, 9 B.T.A. 1332 (1928) (Acq.); *Wisconsin Hydro-Electric Co.*, 10 B.T.A. 933 (1928) (Acq.); *Tampa Electric Co.*, 12 B.T.A. 1002 (1928) (Acq.). See also G.C.M. 1581; CB VI-1, 197.

Similarly, the courts and the Board of Tax Appeals have consistently held that contributions to a railroad company for the construction of side and spur tracks, or for other construction work, are not taxable income. *Great Northern Railway Co.*, 8 B.T.A. 225, 271 (1927) (Acq.) *aff'd* 40 F. 2d 372; *Texas & P. Ry. Co.* v. *United States*, 52 F. 2d 1040 (Ct. Cl., 1931); *Texas & Pacific Railway Co.*, 9 B.T.A. 365 (1927) (Nonacq.); *Atlantic Coast Line Railroad Co.*, 9 B.T.A. 1193 (1928) (Nonacq.); *Kansas City Southern Railway Co., et al.*, 16 B.T.A. 665 (1929); *Midland Valley Railroad Co.*, 19 B.T.A. 423 (1930); *Kansas City Southern Ry. Co., et al.*, 22 B.T.A. 949 (1931); *Union Pacific R.R.*, 26 B.T.A. 1126 (1932) (Acq.); *Southern Railway Co.*, 27 B.T.A. 673 (1933) (Acq.); *Baltimore & Ohio Railroad Co.*, 30 B.T.A. 194, 199 (1934) (Acq.). Also, the cost of construction, by a railroad, of warehouses erected on its right of way, for which it was reimbursed by shippers, is not taxable income to the rail-

road. *Kauai Railway Co., Ltd., et al.*, 13 B.T.A. 686 (1928) (Acq.).

Similarly contributions by community groups to induce new industries to settle in their districts are not income. *Aransas Compress Co.*, 8 B.T.A. 155 (1927) (Acq.); *Frank Holton & Co.*, 10 B.T.A. 1317 (1928) (Acq.). See G.C.M. 16,952; CB 1937-1,133.

Although the question of the inclusion of the contributions in income was not directly at issue, two recent Supreme Court cases support the rule of *Edwards* v. *Cuba Railroad* and the cases following it. In *Detroit Edison Co.* v. *Comm'r*, 319 U.S. 98, 63 S. Ct. 902 (1943), it was held that the cost of extensions of electric transmission lines, paid for by customers, was not includable in the basis for depreciation as taxpayer had no "cost" for such property. The taxpayer had not appropriated or earmarked the customers' contributions for the particular construction for which it was reimbursed, but such contributions went into the taxpayer's general working funds. During the period that a payment was subject to refund, it was carried in a suspense account, but if not subject to refund, or when the refund period was past, the balance was transferred to surplus (p. 100). The court said, "The receipts have gone, so far as here involved, to add to the Company's surplus. They have not been taxed as income, presumably because it has been thought to be precluded by this Court's decisions in *Edwards* v. *Cuba R. Co.*, * * *." (p. 103) Montgomery states with respect to this case: "This decision would

seem to imply acceptance of the 'no income' rule as applied in the cases cited in the preceding paragraph". [*Edwards* v. *Cuba Railroad Co.*, and line extension and spur track cases.] I Montgomery's *Federal Taxes, Corporations and Partnerships* 1951-52, p. 23.

In *Brown Shoe Co.* v. *Comm'r*, 339 U.S. 583, 70 S. Ct. 820 (1950), the court held that buildings and cash contributed by community groups in order to induce a corporation to locate its plants in their communities may properly be considered contributions to capital in determining the taxpayer's excess profits tax computed by the invested capital method. Montgomery, *supra*, states that this decision "also supports the principle that no income is realized on the receipt of such contributions". (p. 23) In this case the cash sums received by the taxpayer from the community groups were not earmarked for, or held intact and applied against, the plant acquisitions in the respective communities but were deposited in the taxpayer's general bank account from which were paid general operating expenses and the cost of all assets acquired. The cash payments were debited to cash account on the assets side of the taxpayer's ledger and were credited to earned surplus either upon receipt or after having first been assigned to contributed surplus. The values of the buildings acquired were set up in the building account on the assets side and were credited to surplus. "Both courts below and the Commissioner have expressly assumed, as petitioner asserts, that the re-

ceipts of property and cash were not taxed as income." (p. 587 and n. 5)

Appellant contends that the increased installation and new supersedure charges are similar to the afore-mentioned government subsidies or donations and to the contributions by utility subscribers or shippers for line extensions or spurs, none of which are "income". In all of these cases and in the case at bar the taxpayer acquired money or property without cost to it. The close affinity of the additional installation and supersedure charges to subscribers' contributions for line extensions is illustrated by the fact that the Commission ordered that the additional charges be credited to account No. 175, "Contributions to Telephone Plant" (R. 51), which is the account used by appellant to record subscribers' contributions for line extensions (R. 23). Subscribers' contributions for line extensions have never been reported or taxed as income (R. 23).

In order to secure the additional charges appellant had to perform certain services in connecting and reconnecting instruments and changing telephone numbers. However, it had to perform this work as part of its regular service in any event and the extra revenue was in the nature of a "windfall" to it—that is, with the exception of the billing and accounting necessary to keep the additional charges segregated, appellant did exactly the same work for subscribers in making connections and supersedures as it had done before the new charges were established and as it did after they were terminated

(R. 26-27). A "windfall" which does not cost the taxpayer anything is not "income". *Central R. Co.* v. *Comm'r*, 79 F.2d 697 (3rd Cir., 1935).

In any case, the fact that the taxpayer must expend capital and labor to become entitled to the subsidy or contribution does not mean that the subsidy or contribution is "income". In *Edwards* v. *Cuba Railroad*, *supra*, the taxpayer had to build the railroad line by use of its capital and labor before it became entitled to the subsidy, and in many of the line extension and spur track cases cited above the taxpayer had to expend capital and use labor to build the line or spur before it became entitled to the contribution.

The fact that appellant's subscribers may have had no "intent" to make a contribution or donation to it is immaterial—there cannot have been any intent on the part of the subscribers or shippers in the line extension and spur line cases, *supra*, to make a contribution or donation to the utility. This point was urged by the dissenting judge in the first of the line extension cases (*Liberty Light & Power Co.*, *supra*, p. 164) but was not accepted by the majority and the Commissioner has long since acquiesced in the decision (CB, VI-1,4). Similarly, the fact that the additional charges came from appellant's usual source of income (its subscribers) and in the performance of one of its normal business functions is not significant since the same was true in the line extension and spur line cases, as pointed

out by the dissenting judge in *Liberty Light & Power Co.*

It is not necessary that the additional charges be treated as part of appellant's invested capital in order to come within the rule of the above cases. In *Tampa Electric Co.*, *supra*, the Board reaffirmed its holding on the same point in *Frank Holton & Co.*, *supra*, and decided that subscribers' contributions for line extensions could *not* be treated by the utility as part of its invested capital (12 B.T.A. 1002, 1006). Also, it is not necessary that the additional charges be earmarked for or applied specifically against capital improvements. In *Edwards* v. *Cuba Railroad*, *supra*, the facts were that the subsidy payment was transferred to the company's *surplus account* (p. 630), and although it was used for capital expenditures it need not have been. It could have been used to pay dividends or for any other purpose. In *Detroit Edison Co.*, *supra*, the utility had not appropriated or earmarked the contributions for capital improvements and the contributions merely went into its general working funds and were finally transferred to surplus. In *Brown Shoe Co.*, *supra*, the cash received was not earmarked for capital items but went into the general bank account and eventually to earned surplus.

The opinion of the District Court below does not deal clearly with this argument that the additional charges are not "income" under the Sixteenth Amendment. The court merely states that the language of the Amendment itself and of the Internal

Revenue Code refute this contention and that the holdings of the Supreme Court negative its validity (R. 96). The cases cited all deal with the "claim of right" doctrine and not with the question of whether subsidies, donations and contributions are "income". *Edwards* v. *Cuba Railroad* holds that under the language of the Sixteenth Amendment a government subsidy is not "income", and the courts and Board of Tax Appeals and the Commissioner have followed this holding for many years and applied it to subscribers' contributions for line extensions and spur tracks. We consider that the additional charges are in all material respects the same as subscribers' contributions for line extensions and should be given the same income tax treatment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the increased installation and new supersedure charges were *not* taxable income to appellant in 1941 and 1942 and that the judgment of dismissal entered by the District Court below should be reversed and that court directed to enter judgment for appellant accordingly.

Respectfully submitted,

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May 20, 1952

No. 13284

In the United States Court of Appeals for the Ninth Circuit

MUTUAL TELEPHONE COMPANY, a Corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District Court for the District of Hawaii

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 96-99) is reported in 100 F. Supp. 164.

JURISDICTION

This appeal involves deficiencies in corporate income, declared value excess profits and excess profits taxes (plus interest paid thereon) for the calendar years 1941 and 1942 in the total sum of $38,434.23, which were duly determined and assessed by the Commissioner of

Internal Revenue, and thereafter paid by the taxpayer to the local Collector of Internal Revenue on February 2, 1945. (R. 10-11, 28-29, 93-94.) Claims for the refund thereof were filed with the Collector by the taxpayer on December 6, 1946, and were rejected by the Commissioner in official notice dated May 19, 1948. (R. 29, 93-94). Thereafter, on August 19, 1949, and within the time provided by Section 3772 of the Internal Revenue Code, the taxpayer brought this action in the District Court for the recovery of the taxes and paid interest in question, together with interest thereon according to law. (R. 3-14.) Jurisdiction was conferred on the District Court by 28 U.S.C., Sec. 1346 (a)(1). Judgment in favor of the United States, with costs, was entered by the District Court on December 4, 1951. (R. 100-101.) Within sixty days thereafter and on January 31, 1952, notice of appeal was filed by the taxpayer (R. 102), pursuant to the provisions of 28 U.S.C., Sec. 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that the Commissioner correctly determined that the taxpayer was required, under the provisions of Sections 22 (a), 41 and 42 (a) of the Internal Revenue Code, to include in its taxable income for the calendar years 1941 and 1942 the newly-established increases in service installation and "supersedure" charges, which the taxpayer petitioned for, and received and collected from its subscribers during those years pursuant to the authorization of the Public Utilities Commission of the Territory of Hawaii.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in the Appendix, *infra.*

STATEMENT

The pertinent facts (including exhibits) were stipulated (R. 18-82), and were adopted by reference accordingly and found by the District Court, as follows (R. 84-96):

The taxpayer is a corporation organized under the laws of the Kingdom of Hawaii and existing under the laws of the Territory of Hawaii. It is a public utility whose principal business consists in furnishing wire telephone service in the Islands. It is subject to the jurisdiction of the Public Utilities Commission of the Territory (hereinafter referred to as the Commission) under Chapter 82, Revised Laws of Hawaii, as amended. Its rates, fares, charges, records, accounting system, financial transactions, etc., are subject to the regulations of the Commission. (R. 84-85.)

On September 10, 1941, the taxpayer filed a petition with the Commission, which was assigned Docket No. 764, in which the taxpayer requested the Commission to authorize certain increases in its installation tariffs and to authorize establishment of new "supersedure" tariffs for the purpose of diminishing the demand for new telephone service in Honolulu. (R. 85.)

Installation, or connection, charges are of two types—service connection charges and reconnection charges. A service connection charge is one customarily made by the taxpayer for connecting each telephone instrument

newly placed into a subscriber's premises. A reconnection charge is one ordinarily made by the taxpayer for reconnecting a dead instrument already in place. A supersedure charge is one, not theretofore made by the taxpayer, for substituting a new subscriber for a prior subscriber at the same premises, where the telephone instrument is not dead and is not reconnected. (R. 85-86.)

After a hearing on the above petition, the Commission filed its Decision No. 51 and its Order No. 379. In the decision the Commission approved the taxpayer's request, and in its order it made the requested increases in the installation and the supersedure tariffs. (R. 86.)

In the decision, the Commission found that while the taxpayer did not contend that additional income was required, it did maintain that the additional charges were required for the retarding effect; that the taxpayer had also made no showing that an increase in revenue was required and that the Commission believed that it was improper to allow the increase to go through in a manner which would permit it to be passed on to the common stockholders in the form of increased dividends; that the increase would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates would be a reduction from the net investment in arriving at a rate base, and that investors would not require a return and subscribers would be spared paying a capital charge on it; that on motion of the Commission or other application of the taxpayer, other disposition of the accrued balance might be made as conditions warranted; and that in the opinion of the

Commission the increased charges should be but temporary. (R. 86.)

In Order No. 379 the Commission directed that the increased installation and the new supersedure charges should be charged to Account No. 175, Contributions to Telephone Plant, and the amounts so accruing should be segregated from the other charges in that account. (R. 87.)

The increased installation and the supersedure charges were put into effect by the taxpayer as of October 2, 1941. On April 22, 1942, the taxpayer filed with the Commission a petition in which it requested a termination of the additional charges. The Signal Corps of the United States Army had established a system of priorities for telephone allocations and consequently the taxpayer considered the additional charges no longer necessary. (R. 87.)

Pursuant to the filing of the petition, the Commission, by Decision No. 57 and Order No. 406, filed on July 18, 1942, terminated the increased and newly-established charges as of May 1, 1942. In its decision and order, the Commission directed that the additional charges collected by the taxpayer under the earlier decision and order were to be held in Account No. 175 until the Commission should determine their final disposition. (R. 87.)

For many years the taxpayer has kept its accounts in accordance with the Uniform System of Accounts for Class A Telephone Companies issued by the Federal Communications Commission, which system was pre-

scribed for the taxpayer by an earlier order of the Commission. (R. 87-88.)

Account No. 175, "Contributions of Telephone Plant," is one of the accounts provided for in the Uniform System. In accordance with that System, the taxpayer credited to Account 175 contributions by its subscribers for line extensions. Such contributions by its subscribers have never been reported by the taxpayer as income for federal income tax purposes, and have never been taxed as income. (R. 88.)

In 1945, the Federal Communications Commission amended the Uniform System of Accounts by eliminating Account No. 175 and instructing that the amounts held in such account be deducted from the appropriate plant asset accounts. The taxpayer in 1945 complied with these instructions with respect to the amounts in Account No. 175 that represented contributions for line extensions. Subaccount 175.2, however, referred to below, was retained intact because of the above-mentioned Order No. 406 of the Commission, terminating the increased and newly-established charges and directing that those which had been theretofore collected be held in Account No. 175. (R. 88.)

The increased installation and the new supersedure charges were collected by the taxpayer from subscribers from October 2, 1941, to May 1, 1942. Pursuant to Order No. 379 of the Commission, the taxpayer credited amounts equal to its collections of the increased installation and new supersedure charges to a new Subaccount No. 175.2, entitled "Liability for Installation Charges." This new subaccount was started by the taxpayer and

maintained as a subaccount under the general Account No. 175, "Contributions of Telephone Plant", in order that the amounts in Subaccount 175.2 could be segregated from the other amounts credited to Account No. 175 in accordance with the Commission's order. (R. 88-89.)

The Government does not concede that the sums received by the taxpayer from subscribers on account of the increased installation and the new supersedure charges which were credited to Subaccount 175.2 were or are liabilities of the taxpayer. (R. 89.)

The taxpayer received $13,341.50 and $28,673 in 1941 and 1942, respectively, on account of the increased and the newly-established installation and supersedure charges. This total of $42,014.40 was adjusted to $41,970.50 in February, 1944, to correct an accounting error of $44 that was detected in reconciling the accounts. (R. 89.)

Subaccount No. 175.2 was credited with all the increased installation and new supersedure charges collected by the taxpayer under Decision No. 51 and Order No. 379. These additional charges were not billed to the customer as such. The subscriber was charged in one sum for the total of his installation or supersedure charge. It was recorded on the bill as "Other Charges" and was explained by a supplemental statement sent out with the bill. This statement was entitled "Statement of Other Charges and Credits" and has several items listed on it. One of these items was "Service Connection Charge" and the installation or supersedure

charge in one amount was recorded opposite this item. (R. 89-90.)

Although the billings to subscribers did not show the amount of the increased installation charges separately from previously existing installation charges and did not show the newly-established supersedure charges separately, the taxpayer maintained its accounting records, as it was required to do by the order of the Commission, so as to reflect the amount of the increased installation charges separately from the previously existing charges, and so as to reflect the newly-established supersedure charges separately from previously existing charges. The additional charges were all credited to Subaccount 175.2, "Liability for Installation Charges," and the taxpayer maintained a record of the amount of the additional installation or supersedure charge paid by each customer so that the exact amounts of such payments could have been refunded to the individual customers if this were ever required. (R. 90.)

The total cost to the taxpayer of making new service connections exceeded the revenue from the tariffs charged therefor—even including additional new connection charges authorized by Order No. 379. The cost of materials, including telephone instruments, switches, wiring and cables, and the cost of field labor required to make the installation, were in the case of each new service connection capitalized by setting up such costs in the taxpayer's plant asset account. These costs remain in the plant asset account until the instrument is removed and at the time of removal are charged to opera-

tions. Administration and office expenses in the case of new service connections were charged off as expenses of operations in the year in which they were incurred. The total estimated cost of each new service connection was $13.92 during this period. The cost of materials and field labor, which was capitalized as aforesaid, was approximately 85% of such total cost, and the cost of administration and office expenses, which was expended as aforesaid, was approximately 15% of such total cost. (R. 90-91.)

The revenue from the tariffs charged for reconnections and supersedures under the Commission's Order No. 379 exceeded the total cost to the taxpayer of making such reconnections and supersedures. Such costs were entirely charged off as expense of operations in the year incurred. (R. 91.)

Of the additional revenue [from service line extensions, installations, connections and supersedures] received by the taxpayer on account of the increased charges as described above (R. 87-89, Par. VI), approximately 60.55% was received on account of the additional service connection charges, 21.35% on account of the additional reconnection charges, and 18.10% on account of the new supersedure charges (R. 91).

With the exception of billing and the accounting necessary to keep the additional charges segregated from other charges, the taxpayer was not required to do, and did not do, any additional work or perform any additional service in order to receive the increased installation charges and the new supersedure charges; that is, it did exactly the same work for subscribers in

making connections and supersedures as it had done before the new charges were established and as it did after they were terminated. (R. 91-92.)

Although Subaccount 175.2 was credited with the additional charges as they were collected and the taxpayer's general cash account was debited, the moneys collected by virtue of the additional charges were intermingled with other moneys in the general treasury of the taxpayer, and were used by the taxpayer without regard to their source. The taxpayer at all times material herein had on hand cash or marketable securities in excess of the amounts collected from subscribers for the increased installation charges and the new supersedure charges. (R. 92.)

The taxpayer maintains its records on the accrual basis, and files its tax returns on the accrual basis for the calendar year. The taxpayer did not report the increased and newly established installation and supersedure charges received in 1941 and 1942 as part of its gross income in its tax returns for 1941 and 1942. (R. 92.)

The taxpayer filed in due time its income tax, declared value excess profits tax, and excess profits tax returns for the calendar years 1941 and 1942 with the Collector of Internal Revenue of the United States for the District of Hawaii. The Report of Examination by the Internal Revenue Agent in Charge, dated November 2, 1943, proposed deficiency assessments of taxes for those years on the grounds of failure to include as gross income the increased installation charges and the new supersedure charges hereinabove described. A protest

of the proposed deficiency assessments on these grounds was filed with the Agent in Charge under date of July 28, 1944. The protest was denied by the Commissioner of Internal Revenue and a notice, dated January 8, 1945, of the determination of deficiencies in income, declared value excess profits and excess profits taxes (plus interest) in the total amount of $36,728.39 was received by the taxpayer, such deficiencies being based upon the taxpayer's failure to include the charges referred to in gross income. (R. 92-93.)

These additional taxes and interest were assessed. They were paid by the taxpayer on February 2, 1945, to Fred H. Kanne, new deceased, but at that time Collector of Internal Revenue for the District of Hawaii. The payment of these taxes and interest was not charged to Account No. 175.2. (R. 93.)

The taxpayer filed claims for refund on December 6, 1946, for each of the calendar years 1941 and 1942 with the Collector of Internal Revenue for the District of Hawaii. The claim for refund for 1941 was for $10,482.57, plus interest; and the claim for 1942 was for $27,951.66, plus interest. The Report of Examination of the Internal Revenue Agent in Charge, dated October 16, 1947, proposed that the claims be disallowed. On June 1, 1948, the taxpayer received a notice of disallowance, dated May 19, 1948, covering both claims for refund, in full, from the Commissioner of Internal Revenue. (R. 93-94.)

During 1948, the Commission, following an application by the taxpayer for an increase in rates, held a hearing on the taxpayer's rates and charges. (R. 94.)

In 1931, the taxpayer's board of directors established a jointly contributory retirement system, known as the "Retirement System of Mutual Telephone Company," to be operated under a board of managers consisting of the president of the taxpayer and four other persons appointed by the board of directors. The Retirement System is a separate entity from the taxpayer, and maintains its own books and accounts. The taxpayer does not have in its own accounts a "pension reserve," as such, and has reserved the right to discontinue or to reduce at any time its contributions to the Retirement System. An employee who took the necessary steps provided for in the Rules and Regulations of the System was credited with years of service put in prior to the establishment of the System, and was issued a certificate stating that he was entitled to all the rights and privileges provided for by the Rules and Regulations, and that he was entitled to a specified prior service credit in full for all service rendered prior to July 1, 1931. (R. 94-95.)

Although the taxpayer did not suggest to the Commission at the time of the 1948 hearing that any action be taken regarding Subaccount 175.2, the Commission on its own initiative, in its Decision No. 102, considered the cost to the taxpayer of the Retirement System, and in Order No. 598 directed that the taxpayer "transfer the amount of $41,970.50 presently carried in Account 175.2, 'Contribution of Telephone Plant,' to its pension reserve to reduce the accrued liability for past service." (R. 95.)

On December 3, 1948, the taxpayer addressed a letter to the Commission outlining the tax difficulties that had

arisen in connection with the additional charges which had been credited to Subaccount 175.2. In that letter, the taxpayer requested that the Commission suspend paragraph 4 of Order No. 598, providing for the transfer of funds from Subaccount 175.2 to the taxpayer's "pension reserve" until a final determination of the amount transferable. On December 22, 1948, the Commission replied that this matter should be held in abeyance by the taxpayer pending formal approval by the Commission. On February 24, 1949, the Commission advised the taxpayer that it had denied the latter's request to suspend the transfer. On March 1, 1949, the taxpayer deposited $41,970.50 in cash to the account of the Retirement System, in the Bank of Hawaii, and deleted Subaccount 175.2. On March 8, 1949, the taxpayer advised the Commission of this action. (R. 95-96.)

In 1949 the taxpayer paid the sum of $232,777.36 to the taxpayer's Retirement System; and in the same year, in determining its taxable net income, the taxpayer deducted the sum of $190,806.86, representing statutory deductions under the Internal Revenue laws, on account of the taxpayer's obligation, if any, under the provisions of the Retirement System. (R. 96.)

Upon the basis of the foregoing facts, the District Court, upholding the Commissioner's determination (R. 28), held that the increased installation and "supersedure" charges were includible in the taxpayer's gross income for the respective taxable years in which received, even though potentially refundable to the subscribers at some subsequent indeterminate time (R.

96-99). The court below thereupon entered its judgment for the United States, with costs, accordingly (R. 100-101), from which the taxpayer appealed to this Court for review (R. 102).

SUMMARY OF ARGUMENT

1. The District Court correctly held that the entire sums received by the taxpayer during the taxable years involved as increased service installation and supersedure charges, authorized by the local Public Utility Commission pursuant to the taxpayer's petition therefor, were received under a claim of right without restriction as to use and disposition and were therefore includible in its taxable income for the respective years in which received. The taxpayer's contentions to the contrary are wholly without merit, substance or support. The facts show that the taxpayer earned the income in question when it performed the installation and reconnection services for its subscribers during the taxable years. Hence, the revenue realized and received by it for services from such increased charges, being at all times in the taxpayer's possession without restriction as to use and disposition, was clearly includible in its taxable income for the respective taxable years when earned and collected. This is true, under the decisions, regardless of whether or not the taxpayer might have been required—which it never was—to refund the excess charges at some indeterminate time in the future.

2. The increased charges in question, contrary to the taxpayer's alternative contentions, clearly constituted taxable income to the taxpayer for the taxable years involved, within the meaning of the Sixteenth Amend-

ment. The District Court's holding that the language of that Amendment itself and of the Internal Revenue Code refutes such contention, is supported by controlling authority. There is no merit to the taxpayer's contention that the increased charges are not taxable under the Sixteenth Amendment because they were in the nature of contributions from its subscribers for line extensions, similar to Government subsidies or contributions by customers to a utility for line or spur track extensions, none of which, the taxpayer asserts, is taxable income to the recipient. On the contrary, the record discloses that the taxpayer received the increased charges during the taxable years, not as capital contributions but, for services rendered, and that its right to use and retain them was unfettered and absolute during the years in which received, as well as thereafter. Under the applicable decisions, therefore, they were clearly includible in the taxpayer's gross income for the taxable years in which received, respectively.

ARGUMENT

The District Court Did Not Err in Holding That the Entire Sums Received by the Taxpayer During the Taxable Years Involved as Increased Service Installation and Supersedure Charges, Authorized by the Local Public Utility Commission Pursuant to the Taxpayer's Petition Therefor, Were Included in Its Taxable Income for the Respective Years in Which Received.

The District Court, sustaining the Commissioner's determination, held that the increased charges in question received by the taxpayer during the taxable years 1941 and 1942 for services rendered in installing new telephones as well as reconnecting old or "dead" ones, petitioned for by the taxpayer in order to retard and

discourage demands for new telephone installations and granted by the Commission in 1941 accordingly, were includible in the taxpayer's gross income for those years. The grounds for so holding were that the additional charges were received by the taxpayer in the taxable years from the subscribers under a claim of right without restriction as to use or disposition, even though the taxpayer might have been required to refund the increases at some indeterminate time in the future. (R. 96-99.) The court below followed the long line of decisions announcing the "claim of right" doctrine, beginning in 1931 with this Court's decision in *Burnet* v. *North American Oil Consolidated,* 50 F. 2d 752, affirmed, 286 U. S. 417, and continuing down to the comparatively recent decisions of the Supreme Court (*Commissioner* v. *Wilcox,* 327 U. S. 404; *United States* v. *Lewis,* 340 U. S. 590, rehearing denied, 341 U. S. 923), this Court (*Wilcox* v. *Commissioner,* 148 F. 2d 933, affirmed, 327 U. S. 404; *Commissioner* v. *Alamitos Land Co.,* 112 F. 2d 648, certiorari denied, 311 U. S. 679), and the other Courts of Appeals.[1] (R. 96-97.) In arriving at its decision, the court expressed particularly appropriate concern for the reality of the fact that a contrary decision would permit the taxpayer "to retain these gains * * * and yet pay no income tax upon them", rather than for "the niceties of accountancy technique" and the "jargon of bookkeeping." (R. 97.) The taxpayer contends that this is error. (Br. 13, 36-42.)

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[1] See fn. 3, *infra*

The taxpayer, substantially as below (R. 96, 98), urges that the increased charges received by it in the taxable years were not taxable income for those years because (1) they were not received under a claim of right and subject to its unfettered command and use, but rather were subject to the restriction imposed by the Commission that they be segregated and held in a special account (Br. 16-43); and (2) alternatively, they were not taxable income for the taxable years or for "any other year" because, being in the nature of contributions by the subscribers, they do not constitute "income" at all within the meaning of the Sixteenth Amendment (R. 44-51). The taxpayer's principal argument seems to be that because of the Commission's directives that the increased charges had to be segregated and retained in a special account, were not to be taken into its income account until authorized by the Commission, and were not to be passed on to its common stockholders in the form of increased dividends or to be considered as part of its capital investment, the revenue derived from such additional service charges was not taxable income; and that if income, it was not taxable to the taxpayer in the years 1941 and 1942, when received, because it was held subject to restriction and not subject to the taxpayer's unfettered use and enjoyment at its option.

We submit, however, that in the light of the decisions of the Supreme Court, this Court and many other courts, there is no merit to the taxpayer's contentions, and that the District Court's decision is clearly correct. Our position is that the taxpayer earned the income in

question when it performed the installation and reconnection services for its customers during the taxable years involved and received such income under a claim of right, and that therefore the revenue realized and received from the increased charges, at all times in the taxpayer's possession without restriction as to its use and disposition, was plainly includible in its taxable income for the respective taxable years in which earned and collected. We submit that this is true regardless of whether or not the taxpayer might have been required to refund the excess charges at some indeterminate time in the future.

A. The Increased Charges in Question Were Received by the Taxpayer During the Taxable Years Under a Claim of Right and Without Restriction Shown as to Their Use and Disposition.

The record shows that the entire increased charges in controversy were realized and collected from the subscribers during the taxable years by the taxpayer, under authorization of the Commission, and therefore, contrary to the taxpayer's contentions (Br. 20-21), they were clearly received under a claim of right and bona fide belief that they were its own, as of right (R. 19, 20-21, 32-52, 85, 86, 97). As the taxpayer admits (Br. 25), "True * * * [the increased charges were] received * * * and mingled * * * with its other receipts *and used* * * * without regard to source" during the taxable years, and thereafter. (Italics supplied.) Moreover, the increased charges were credited to the taxpayer's "Contributions to Telephone Plant" account to provide a reduction from net investment in arriving at the rate base for computing decreased rates in favor of the subscribers, who would thereby be spared

paying a capital charge thereon and therefore as "investors would not require a return" of such increased charges from the taxpayer. (R. 20-21, 46, 86.) Further than that, it merely remained in the Commission's discretion, as to the taxpayer's additional receipts in question, to decide "at some future date [what] other disposition of the accrued balance in said account 175.2 *might be made* as conditions warrant", if any. (Italics supplied.) (R. 61, 86.) The additional moneys were to be credited to special Subaccount No. 175.2 and not taken into the income account "*until such time* as the Commission *may* authorize such action" in the future (italics supplied) (R. 64), and thereupon the "Commission should determine their final disposition" (R. 22, 87). This the Commission eventually did—but not until 1949—by requiring the taxpayer to transfer such additional funds, long since on hand and in use (App. Br. 25), to its retirement pension reserve fund *for the benefit of its employees* (R. 30-32, 76-78, 95-96; App. Br. 11-12, 23). Meanwhile, the taxpayer, contrary to its erroneous statements (Br. 23, 43), had, at its option and without any restriction shown, unfettered command and full use, freedom and benefit of the additional funds not only during the taxable years but also for more than six years thereafter—until they were ultimately, not refunded to its subscribers but, allocated to its employees' retirement system for their and the taxpayer's direct and *permanent* benefit (R. 30-32, 76-78, 95-96).

The fact that the taxpayer, in order to keep, from an accounting standpoint, the increased charges segre-

gated from other funds, credited them to the new "Liability for Installation Charges" Subaccount No. 175.2 (R. 23, 88-89; App. Br. 7-9, 21), after having first credited them to its "Contributions to Telephone Plant" Account No. 175 (R. 20-21, 86-87; App. Br. 8), as required by the Commission (R. 86-89), did not in anywise alter the taxable status of such excess charges during the taxable years *when received* by the taxpayer for services rendered (R. 89, 86-99; App. Br. 5-6). It is settled that the application and use of such classifications, accounts, credits, etc., under rules of accounting imposed and required by public utility and other like commissions, generally, are not binding on the Commissioner of Internal Revenue. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 562; *Kansas City Southern Ry Co.* v. *Commissioner,* 52 F. 2d 372, 377-378 (C.A. 8th), certiorari denied, 284 U. S. 676. "Obviously, the manner in which the taxpayer entered the items on its books is of no moment." *Baboquivari Cattle Co.* v. *Commissioner,* 135 F. 2d 114, 116 (C.A. 9th). The taxpayer cites that case (Br. 19-20) for the proposition that "This Court has recognized that sums required to be placed in a particular account or otherwise earmarked or restricted *may* not be income" (italics supplied), and thereupon conjures up the gratuitous conclusion that "*if*" the taxpayer there had been required by the Government to segregate and hold its conservation payments in a particular account, as the taxpayer was required by the Commission to do with the increased charges here, then "this Court would not have thought them income." This Court's decision holding that the taxpayer was chargeable with the sums received during

the taxable years there, however, did not turn on the fact that the sums involved were not required to be kept in a particular account or fund or otherwise earmarked, but clearly on the fact that there was not "any restriction on their use" (p. 116), as here. Thus, quite clearly, the manner in which the taxpayer was required by the Commission to enter the items in question here on its books—segregation in a particular account (R. 23, 88-89)—is neither of any moment nor determinative, as this Court indicated in the *Baboquivari* case (p. 116). The taxpayer itself even goes so far as to say (Br. 26, 29) that "It would be unduly technical and would exhalt form above substance to make the result in this case depend upon the segregation of the physical currency", and that all the cited "authorities show that the fact of intermingling of the additional charges with the other monies in appellant's general treasury is immaterial in determining whether the additional charges were income to appellant in 1941 and 1942." We think that the intermingling of the increased charges with the taxpayer's regular currency is material to the issue involved but conceding, for the purpose of argument only, that the taxpayer's statement in this respect is correct, then it must follow, *a fortiori,* that it is clearly of no consequence that the "Appellant * * * could not and did not take the [increased charges of] $41,970.50 into its income account" during the taxable years. (App. Br. 30.) Hence, there is no support in the record for the taxpayer's "principal" argument (Br. 36) that the Commission's order to segregate and hold the additional charges in Subaccount No. 175.2,

without restriction on its use shown, amounted to "The presence of a restriction" under which such charges were not taxable income in the taxable years 1941 and 1942.

In these circumstances, it is clear that the taxpayer had gained title to and unrestricted use and benefit of the additional funds during the taxable years—and, indeed, permanently thereafter—and claimed and treated them as its own at all times material. (R. 24-27, 89-92.) Since the record plainly shows, as pointed out, that the subscribers "would not require a return" and in fact never received any return of the increased charges collected by the taxpayer during the taxable years (R. 21, 46, 86), therefore, it is quite clear that the funds, for income tax purposes at least, belonged to the taxpayer *in fact,* without restriction shown as to use and enjoyment. Moreover, since other potential disposition "might be made" by the Commission at some future date (R. 61), and such *final* disposition was eventually made in 1949 by its requiring the taxpayer to transfer the funds to its employees' retirement pension fund (R. 30-32), it is apparent that the probability of the taxpayer's ever having to repay the funds was practically nil; they were never refunded. If, however, such probability be considered contingent for undisclosed reasons, that would nevertheless be no bar to taxability of the additional revenue in question for, as the taxpayer admits (Br. 29), "the contingent obligation of appellant to *repay* the additional charges would not be sufficient to keep them out of income in the year received under the decision in *North American*

Oil Consolidated v. *Burnet, supra,* and cases following it", citing *Commissioner* v. *Alamitos Land Co.,* 112 F. 2d 648 (C.A. 9th), certiorari denied, 311 U. S. 679, for example. Nor would the contingent liability to refund, if any, affect the quality of the additional charges as income in the earlier years of receipt. *North American Oil* v. *Burnet,* 286 U. S. 417, 424; and see *Brown* v. *Commissioner,* 63 F. 2d 66, 68 (C.A. 9th), affirmed, 291 U. S. 193, 199. In any event, the transfer of the excess funds to the taxpayer's retirement pension fund in 1949 (R. 30-32, 76-78, 95-96) clearly effected final action as to the Commission's possible ultimate disposition thereof, thus terminating the taxpayer's potential contingent liability, if any, to repay, and relieving it of any further probability of ever having to refund the additional charges to the subscribers. *Commissioner* v. *Brooklyn Union Gas Co.,* 62 F. 2d 505, 506 (C.A. 2d). These are the undisputed facts and principles which show conclusively that the increased charges unquestionably constituted income to the taxpayer for the taxable years 1941 and 1942, when received for services rendered.

In *Board* v. *Commissioner,* 51 F. 2d 73 (C.A. 6th), certiorari denied, 284 U. S. 658, followed by the court below (R. 98-99), the Sixth Circuit held the income taxable in the year (1920) received by the taxpayer, despite subsequent litigation respecting his right thereto which terminated in a later year. The court stated (pp. 75-76):

> We are of the opinion that the board was right in allocating this income to the year 1920. That it

> was actually received during that year is not disputed; nor is it disputed that it was received under a claim of right and as profits to which the petitioner was justly entitled. The only claim made is that the contract whereby petitioner purported to secure his interest in the pipe line was illegal and unenforceable by reason of his position as a director of the Old Dominion Oil Company. In this contention the petitioner of course never acquiesced. *The payment was never refunded.* Possibly it *might have been* recovered in the litigation which was instituted for that purpose, *but it was not* * * *. Obviously, the sum involved must be considered as income either for the year 1920 or 1927, and we think that it must be allocated to the year 1920, *in which it was actually received,* rather than to the year 1927, in which the taxpayer's rights to retain it was established. [Italics supplied.]

See also *Penn* v. *Robertson,* 115 F. 2d 167, 175 (C.A. 4th), cited by the District Court (R. 99), which, contrary to the taxpayer's contention (Br. 42), is indistinguishable.

Likewise but more favorable to our position here, the taxpayer's claim of right was clearly without restriction as to possession, use and enjoyment of the funds in question, there was no illegality or controversy as to the taxpayer's undisputed right, duly authorized by the Commission, to receive and retain the increased charges, the payment was never refunded, and therefore the income involved is allocable and must be allocated only to the taxable years 1941 and 1942 in which

it was received and—differently from the *Board* case—in which the taxpayer's right to retain it was never questioned but was established beyond cavil.

We submit that, contrary to the taxpayer's contentions (Br. 16, 30, 38-40), the issue involved is well nigh concluded by *Commissioner* v. *Brooklyn Union Gas Co.,* 62 F. 2d 505 (C.A. 2d), a case on all fours which presented a much more favorable situation from the standpoint of the taxpayer there involved than that presented here.[2] In that case the additional charges, in excess of the rates provided by New York State law and orders of the State Public Service Commission, made by the taxpayer and its affiliated companies during the years 1916 to 1922, inclusive, for gas furnished their customers in those years were permitted by court order under which the so-called "excess moneys" were impounded to await final decision as to their right to charge higher rates, and such final decision was rendered in 1922, the taxable year involved, holding them to have been entitled to such higher rates for all years involved. The Commissioner contended that the excess moneys represented income to the taxpayer and its

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[2] The many cases cited and relied on by the taxpayer—in further attempted support of its contention that the increased charges in question were not income because they were allegedly not received without restriction as to use and disposition, or subject to its unfettered command (Br. 22-26)—involving funds impounded or otherwise held in custody or restricted for specific purposes (Br. 31-36), not involved here, are not in point. The *Brooklyn Union Gas* case, involving funds withdrawn from impoundment and used by the taxpayer, is clearly distinguishable from any of those cases and, contrary to the taxpayer's attempted distinction (Br. 38-40), is directly in point.

subsidiaries, reporting on the accrual basis, in the year 1922 when the rate litigation was finally terminated on the ground that until then the right to such moneys was contingent. Rejecting this theory, the Board of Tax Appeals held (*Brooklyn Union Gas Co.* v. *Commissioner,* 22 B.T.A. 507, 523-526) that the excess moneys constituted income in the prior years when earned, that is, in the years 1916 to 1921, inclusive, when the gas was furnished and the excess charges therefor were made against the consumers upon the companies' books. This resulted in allocating to income of the years prior to the taxable year 1922 approximately $8,600,000, thereby diminishing the deficiency in tax which the Commissioner had determined for 1922.

The Second Circuit in that case, distinguishing (p. 506) *North American Oil* v. *Burnet,* 286 U. S. 417, and affirming the Board's decision, held that the so-called "excess charges"—representing the excess of the amounts charged for gas by the taxpayer and its subsidiaries over the rates fixed by the State Public Service Commission—were taxable income to the taxpayer for the years in which the services were rendered for which such excess charges were earned and accrued against the consumers on the companies' books. The amounts held taxable were the portions of the funds in question in excess of the statutory rate which, prior to the taxable year 1922 and pursuant to court decrees interlocutory or final, were either withheld or withdrawn from impoundment upon the giving of bonds. Because of direct applicability to the facts here, we quote at length from the court's opinion (p. 506):

Were it not for the case of *North American Oil Consol* v. *Burnet,* 286 U. S. 417 * * * we should unhesitatingly adopt the theory of the Board that the moneys in dispute were income in the year when the service was rendered. To that year was allocated the entire cost of manufacture and distribution of the gas, and to the same year should be attributed the whole price at which it was sold, if the taxpayer's profit on the transaction is to be accurately reflected by the accrual method of bookkeeping. The cases relating to compensation subsequently awarded to railroads for the years of federal control, upon which the Board relied, furnish a persuasive analogy. See *Commissioner* v. *Old Dominion S.S. Co.,* 47 F. (2d) 148 (C.C.A. 2); *Continental Tie & L. Co.* v. *United States,* 286 U. S. 290 * * *; compare *Uncasville Mfg. Co.* v. *Commissioner,* 55 F. (2d) 893 (C.C.A. 2), cert. denied, 286 U. S. 545 * * *. But the *North American Oil* case gives us pause. There a receiver was appointed to operate a certain property pending the outcome of a suit brought to contest the taxpayer's title thereto. Net income produced from the receiver's operation of the property in 1916 was turned over to the taxpayer in 1917, upon the entry of a final decree dismissing the bill of complaint. The decree was appealed, and the litigation was not terminated until 1922. The taxpayer contended that the net profit should be allocated either to 1916 or 1922, but the court held it to be income for the year 1917, when it was received. While this case casts doubt

upon the correctness of the Board's theory that the excess moneys are to be allocated to the years, respectively, when the gas was sold, it strongly supports the decision that final termination of the litigation was not the critical moment. As the Supreme Court said, at page 424 or 286 U. S. * * *:

"If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

We think this is conclusive against the Commissioner's contention with respect to the excess moneys which prior to 1922 were withheld or withdrawn from impoundment upon bonds fixed by the court. Such money was income, being payment for service already rendered, and was received by the companies without restriction upon its use. It is true they were subject to a contingent liability to pay back an equivalent amount if the rate litigation ultimately went against them. This liability, however, imposed no restriction upon their use of the money actually in their hands. Nor did the fact that they gave bonds to get it add anything to the contingent liability they were under regardless of such bonds. Termination of the rate litigation merely determined their right to retain income already received. See *Board* v. *Commissioners,* 51 F. (2d) 73, 76 (C.C.A. 6). The money received

> prior thereto cannot be taxed as income of the year 1922.

In these circumstances, we fail to perceive wherein the rationale of this decision tends in anywise to support the taxpayer's position here, as it insists. (Br. 39.)

To the same effect, see *Baboquivari Cattle Co.* v. *Commissioner,* 135 F. 2d 114 (C.A. 9th), and the cases cited therein (p. 116): *Texas & Pacific Ry. Co.* v. *United States,* 286 U. S. 285; *Helvering* v. *Claiborne-Annapolis Ferry Co.,* 93 F. 2d 875 (C.A. 4th); and *Lykes Bros. S.S. Co.* v. *Commissioner,* 126 F. 2d 725 (C.A. 5th). See also *Crossett Timber & Development Co.* v. *Commissioner,* 29 B.T.A. 705, 709-710, where the Board of Tax Appeals, holding that the royalties received in excess of the royalties on production under the minimum royalty requirements were income when received, even though at some future time the taxpayer might be required to repay the excess, stated (p. 710):

> The conditions * * * which might require repayment [of part of the excess royalties] were conditions subsequent and did not prevent petitioner's unfettered use of the money in the year of receipt. * * *

Citing the Second Circuit's decision in *Commissioner* v. *Brooklyn Union Gas Co.,* 62 F. 2d 505, the Board added (p. 710):

> The principle of that case is applicable here. The contingent liability which might at some future time require repayment of some indeterminate portion of the royalties imposed no restriction upon

petitioner's use of the money currently as received. See also *Consolidated Asphalt Co.,* 1 B.T.A. 79; *Uvalde Co.,* 1 B.T.A. 932.

Compare also, *United States* v. *Lewis,* 340 U. S. 590, 592, rehearing denied, 341 U. S. 923; *Wilcox* v. *Commissioner,* 148 F. 2d 933 (C.A. 9th), affirmed, 327 U. S. 404; *Board* v. *Commissioner,* 51 F. 2d 73, 75-76 (C.A. 6th), certiorari denied, 284 U. S. 658; *Haberkorn* v. *United States,* 173 F. 2d 587 (C.A. 6th); *Gilken Corp.* v. *Commissioner,* 176 F. 2d 141, 145 (C.A. 6th).

Likewise here, the moneys received, collected and used by the taxpayer during the taxable years and thereafter, representing payment for services already rendered and received by it without restriction upon its use, constituted taxable income for the taxable years. The taxpayer's contingent liability to repay, if any, contrary to its contentions (Br. 43), "imposed no restriction" whatever upon its use of the money in its hands at all times material, as the Second Circuit put it in the *Brooklyn Union Gas Co.* case, *supra* (p. 506).

If more is necessary to resolve the issue, we submit that, contrary to the taxpayer's contentions (Br. 16-20), the income from the increased charges in question can be allocated and, under the controlling decisions, is properly allocable only to the taxable years involved. It is settled that the imposition of a tax upon income requires that points of time be fixed between which the income is to be measured for tax purposes for, as the Supreme Court said in *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 363:

> All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt. * * *

Thus, Section 41 of the Internal Revenue Code (Appendix, *infra*) prescribes that "The net income shall be computed upon the basis of the taxpayer's *annual* accounting period"; Section 42 (Appendix, *infra*), entitled "Period In Which Items Of Gross Income Included", requires that "The amount of all items of gross income shall be included in the gross income *for the taxable year in which received* by the taxpayer"; and Section 48 (Appendix, *infra*) defines the taxable year as meaning the calendar year or the fiscal year "upon the basis of which the net income is computed". (Italics supplied.) See also Sections 19.41-1, 19.41-4 and 19.42-1 of Treasury Regulations 103, and Sections 29.41-1, 29.41-4 and 29.42-1 of Treasury Regulations 111 (all Appendix, *infra*). As the Supreme Court further explained in the *Sanford & Brooks Co.* case, a rule of annual accounting is requisite, as a general matter, both to assure the Government regular and ascertainable production of revenue and a system susceptible of practicable operation (p. 365):

> The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should

> produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. * * *

If, instead of this system of annual accounting, a basis of finally ascertained results of particular transactions is to be substituted, Congress and not the courts must provide it. *Burnet* v. *Sanford & Brooks Co., supra,* p. 367.

This general principle of annual accounting has been consistently applied by the Supreme Court, in the absence of specific statutory provisions to the contrary, to a number of varying circumstances. For example, *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, 120 (corporation may deduct bonuses paid to officers in taxable year though services were largely rendered in previous years); *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301, 306 (taxpayer cannot deduct from income for taxable year "depreciation, depletion, business losses or other similar items attributable to other years"); *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 326 (no deduction of losses suffered in earlier years); *Brown* v. *Helvering,* 291 U. S. 193 (contingent liability not actually incurred in taxable year may not be deducted as expense paid or incurred); *Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493, 498 (decedent partner's estate taxable on all income received during taxable year, including that earned after end of partnership's fiscal

year, and not simply on income earned during partnership's year).

The Supreme Court's ruling in *North American Oil* v. *Burnet,* 286 U. S. 417, announcing the "claim of right" doctrine which is controlling here, is another corollary of the general principles expounded in the *Sanford & Brooks Co.* case, *supra.* In the *North American Oil* case, as heretofore shown, the Supreme Court held income taxable in the year of receipt (1917), even though the litigation on which the right to the money depended was still in process and was not decided until 1922. In oft-followed language, Mr. Justice Brandeis said for the Court (p. 424):

> The net profits earned by the property in 1916 were not income of the year 1922 — the year in which the litigation with the Government was finally terminated. They became income of the company in 1917, when it first became entitled to them and when it actually received them. If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. See *Board* v. *Commissioner,* 51 F. 2d 73, 75, 76. Compare *United States* v. *S. S. White Dental Mfg. Co.,* 274 U. S. 398, 403. If in 1922 the Government had prevailed, and the company had been obliged to refund the profits received in 1917, it would have been entitled to a deduction from the profits of

> 1922, not from those of any particular year. Compare *Lucas* v. *American Code Co., supra.*

The holding in that case was that the contingent liability to refund did not affect its quality as income in the earlier year of receipt. See *Brown* v. *Commissioner,* 63 F. 2d 66, 68 (C.A. 9th), affirmed, 291 U. S. 193, 199. Thus, whether, in fact, the money was or was not later refunded was irrelevant to the issue presented and decided.

Moreover, in succeeding decisions, the Supreme Court has afforded repeated confirmation to the principle of the *North American Oil* case. Thus, the quality of receipts, as income, is not affected by the circumstance that part may have to be refunded in some future year, in the event a contingent obligation, subject to which the payment was received, becomes absolute. So the Supreme Court, referring to the *North American Oil* case, held in *Brown* v. *Helvering,* 291 U. S. 193, 199:

> When received, the * * * right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment. * * *

Nor is it of any significance that until completion it cannot be known whether a business venture as a whole has been profitable, for (*Heiner* v. *Mellon,* 304 U. S. 271, 275, 276)—

> Under that law [the federal income tax system] the question whether taxable profits have been

made is determined annually by the result of the operations of the year.

* * * *

[and]

* * * the tax on a year's income may not be withheld because losses may thereafter occur. * * *

In *Security Mills Co.* v. *Commissioner,* 321 U. S. 281, the receipt by the taxpayer of a procession tax, as part of the sales price of goods sold, was held to constitute income in the year of receipt, even though the validity of the tax was then in dispute, and the tax was refunded by the taxpayer to the purchasers in later years (p. 284). Quoting from and following *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, as expressing a "legal principle * * * often * * * stated and applied" (p. 286), the Supreme Court rejected the taxpayer's contention, which would have (pp. 285-286)—

> upset the well-understood and consistently applied doctrine that cash receipts or matured accounts due on the one hand, and cash payments or accrued definite obligations on the other, should not be taken out of the annual accounting system and, for the benefit of the Government or the taxpayer, treated on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or to the taxpayer.

Commissioner v. *Wilcox,* 327 U. S. 404, affirming this Court's decision therein (148 F. 2d 933), provides further proof of the Supreme Court's acceptance of the

"claim of right" doctrine, for there, referring to the *North American Oil* case, *supra,* the Court said (p. 408):

> For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of Section 22 (a). * * *

The *Wilcox* case, however, involved the tax liability of an embezzler, and in determining that the amount embezzled was not income for tax purposes, the Supreme Court, like this Court (148 F. 2d 933, 934-935), stressed the fact that the embezzler had (p. 408)—

> received the money without any semblance of a bona fide claim of right. And he was at all times under an unqualified duty and obligation to repay the money to his employer.

That case did not overrule or modify the rule of the *North American Oil* case, *supra*, *United States* v. *Lewis*, 340 U. S. 590, rehearing denied, 341 U. S. 923. In the present case, in contrast to the *Wilcox* case, the money was received under a claim of right and concededly was *bona fide,* having been collected pursuant to the authorization of the Commission. Moreover, as heretofore pointed out, the taxpayer is not shown to have had any

obligation whatever, contingent or otherwise, to repay during the taxable years or thereafter, nor did it ever repay; and, contrary to its assertions (Br. 43), at the time of its receipt of the increased charges, it had undisputed title and unrestricted use thereof as its own.

Here, as in *St. Regis Paper Co.* v. *Higgins,* 157 F. 2d 884, 885 (C.A. 2d), certiorari denied, 330 U. S. 843—

> the recipient was not without all semblance of right and title to them [the dividends] as was the embezzler in *Commissioner* v. *Wilcox,* 327 U. S. 404 * * *.

Five additional Courts of Appeals, which have had occasion to pass upon the question, have similarly understood the *Wilcox* case: *Fletcher* v. *Commissioner,* 158 F. 2d 42, 43-44 (C.A. 8th); *Greenfeld* v. *Commissioner,* 165 F. 2d 318, 320 (C.A. 4th); *Currier* v. *United States,* 166 F. 2d 346, 348 (C.A. 1st); *Akers* v. *Scofield,* 167 F. 2d 718, 719 (C.A. 5th), certiorari denied, 335 U. S. 823; and *Haberkorn* v. *United States,* 173 F. 2d 587, 590 (C.A. 6th), where the court stated:

> The *Wilcox* opinion does not purport to overrule the established principle applied in *North American Oil Consolidated* v. *Burnet.* It was decided upon the particular facts involved, which in the Court's opinion made the usual rule inapplicable.

And now the Supreme Court has thus finally passed upon and understood it. *United States* v. *Lewis, supra.*

In the years intervening since this Court's decision in *Burnet* v. *North American Oil Consolidated,* 50 F. 2d 752, and the Supreme Court's affirmance thereof,

286 U. S. 417—enunciating the "claim of right" doctrine which has been repeatedly followed and applied in a multitude of cases [3]—conflicts have arisen among the courts as to whether the above-mentioned principle was to be applied in cases where salary, because of an erroneous computation, had been overpaid in one year, and it was determined in a later year that a portion of the salary must be returned. The Court of Claims in *Greenwald* v. *United States,* 57 F. Supp. 569, 572-573, held that an excess bonus so received was received "due to a mistake of fact", and therefore was not income in the year in which it was received; see also *Gargaro* v. *United States,* 73 F. Supp. 973, 975 (C.Cls.), on demurrer (1947), and 86 F. Supp. 840, on the merits (1949).[4] The contrary was held in *Haberkorn* v. *United*

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[3] See, for example, the following representative decisions: *Boston Consol. Gas Co.* v. *Commissioner,* 128 F. 2d 473 (C.A. 1st); *St. Regis Paper Co.* v. *Higgins,* 157 F. 2d 884 (C.A. 2d), certiorari denied, 330 U. S. 843; *Commissioner* v. *Hartfield,* 194 F. 2d 662 (C.A. 2d), petition for a writ of certiorari filed, May 20, 1952; *Clay Sewer Pipe Ass'n* v. *Commissioner,* 139 F. 2d 130 (C.A. 3d); *Anderson* v. *Bowers,* 170 F. 2d 676 (C.A. 4th), certiorari denied, 337 U. S. 918; *Akers* v. *Scofield,* 167 F. 2d 718 (C.A. 5th), certiorari denied, 335 U. S. 823; *Haberkorn* v. *United States,* 173 F. 2d 587 (C.A. 6th); *Griffin* v. *Smith,* 101 F. 2d 34-4 (C.A. 7th), certiorari denied, 308 U. S. 561; *Fleischer* v. *Commissioner,* 158 F. 2d 42 (C.A. 8th); *Capital Warehouse Co.* v. *Commissioner,* 171 F. 2d 395 (C.A. 8th); *Saunders* v. *Commissioner,* 101 F. 2d 407 (C.A. 10th); *Barker* v. *Magruder,* 95 F. 2d 122 (C.A.D.C.).

[4] As against its deviation in the *Greenwald* and the *Gargaro* cases, the Court of Claims in four other cases followed and correctly applied the "claim of right" principle, as established in the *North American Oil* case: *McDuffie* v. *United States,* 19 F. Supp. 239, 246-247 (1937); *Thomas* v. *United States,* 22 F. Supp. 412, 415 (1938); *Schramm* v. *United States,* 36 F. Supp. 1021 (1941); *Agne* v. *United States,* 42 F. Supp. 66, 72-73 (1941).

States, 173 F. 2d 587, 590 (C.A. 6th). This conflict was resolved by *United States* v. *Lewis,* 340 U. S. 590, 591, rehearing denied, 341 U. S. 923, wherein the Supreme Court reiterated what it had said in the *North American Oil* case; and stated that nothing in the language there used permitted an exception merely because a taxpayer is "mistaken" as to the validity of his claim. It stated further that the "claim of right" doctrine had not been impaired by its decisions in *Freuler* v. *Helvering,* 291 U. S. 35, and *Commissioner* v. *Wilcox,* 327 U. S. 404; to the same effect, see *General Outdoor Advertising Co.* v. *Helvering,* 89 F. 2d 882, 883 (C.A. 2d).[5]

B. The Increased Charges in Question Clearly Constituted Taxable Income to the Taxpayer for the Years 1941 and 1942, Within the Meaning of the Sixteenth Amendment.

The taxpayer also contends, alternatively, as below (R. 96), that the increased charges in question were not taxable income to it in the taxable years involved or for any other year, within the meaning of the Sixteenth Amendment (Br. 15, 44-51). The argument is that such charges were in the nature of contributions from the taxpayer's subscribers for line extensions, similar to Government subsidies or donations or to contributions by customers to a utility for line or spur track extensions, none of which, the taxpayer asserts, is includible in the taxable income of the recipient. (Br. 44-51.) This argument is far fetched and wholly without merit.

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[5] See also, *Commissioner* v. *Smith,* 194 F. 2d 536 (C.A. 6th), petition for a writ of certiorari filed, June 18, 1952, holding for the taxpayer on authority of *Commissioner* v. *Wilcox,* 327 U. S. 404.

In this connection, the District Court—citing such cases as *North American Oil* v. *Burnet,* 286 U. S. 417; *Commissioner* v. *Wilcox,* 327 U. S. 404, affirming this Court's decision therein (148 F. 2d 933); and *United States* v. *Lewis,* 340 U. S. 590, for example—held as follows (R. 96):

> Not only does the language of the Amendment itself and of the Internal Revenue Code refute this contention, but also do the holdings of the Supreme Court negative its validity.

We doubt that anyone would *seriously* attempt to gainsay the correctness of that holding, under the facts here.

Nor does the taxpayer's argument that the increased charges in question are excludible from taxable income for the taxable years because they were allegedly "similar to" contributions by the subscribers or others for line extensions, spur tracks, etc. (Br. 44), carry any weight. It is clear that, under the facts in this case, the increased charges collected and received by the taxpayer for services rendered its subscribers during the taxable years, as shown, cannot by any stretch of the imagination be considered as items *similar to* or even remotely in the nature of contributions, donations, subsidies, etc., by the subscribers and customers, or by community groups, governments, etc., for whatever purposes, as in the several cases cited by the taxpayer (Br. 44-49). As this Court, distinguishing *Edwards* v. *Cuba Railroad,* 268 U. S. 628 (relied on by the taxpayer here (Br. 44-45), stated in *Baboquivari Cattle Co.* v. *Commissioner,* 135 F. 2d 114, 116, where the taxpayer contended that the Government's soil conservation pay-

ments made to it were not income at all but either gifts or capital subsidies:

> It is of little importance, we think, what name be applied to the payments, whether they be called "subsidies" as insisted upon by the taxpayer, or "benefits" as they were termed by the Board. In either event they are within the broad concept of income as that term is defined in § 22 (a) of the 1926 Act. Consult *Eisner* v. *Macomber,* 252 U. S. 189 * * *. * * * Obviously, the manner in which the taxpayer entered the items on its books is of no moment.
>
> * * * *
>
> We think the case of *Edwards* v. *Cuba Railroad Co., supra,* is distinguished by what has been said. The situation here is more nearly like those involved in *Texas & Pacific Ry. Co.* v. *United States,* 286 U. S. 285 * * *; *Helvering* v. *Claiborne-Annapolis Ferry Co.,* 4 Cir., 93 F. 2d 875; and *Lykes Bros. S.S. Co.* v. *Commissioner,* 5 Cir., 126 F. 2d 725, where analogous governmental payments were held to be taxable income.

Furthermore, the taxpayer's statement that it obtained the increased charges "without cost to it", just as each taxpayer acquired money or property in the cited cases (Br. 48), is patently erroneous. As the taxpayer admits (Br. 48), *"In order to secure* the additional charges appellant had to perform certain services in connecting and reconnecting instruments and changing telephone numbers * * * as part of its regular service" furnished not only its current subscribers but,

additionally, its new subscribers as well as the former ones, reinstated and reconnected, during the taxable years involved. (Italics supplied.) The record shows that the taxpayer's additional revenue realized therefrom during those years "exceeded the total cost * * * of making such reconnections and supersedures * * * [which was] entirely charged off as expense of operations in the year incurred", and entailed whatever *additional* clerical and accounting services as were necessarily furnished in connection therewith. (R. 26, 91.) Hence, it is clear, to paraphrase the language of the court in *Commissioner* v. *Brooklyn Union Gas Co.,* 62 F. 2d 505, 506 (C.A. 2d) (dealt with under Subheading A, *supra*), that—

> the moneys in dispute were income in the year when the service was rendered. To that year was allocated the entire cost of manufacture and distribution of the * * * [necessary material and services for the installation of the new and the reconnection of the old telephones (R. 25, 90)], and to the same year should be attributed the whole price at which it was sold, if the taxpayer's profit on the transaction is to be accurately reflected by the accrual method of bookkeeping. * * *

Accordingly, contrary to the taxpayer's statement (Br. 48), it goes without saying that the increased charges were not acquired by the taxpayer without cost, but very clearly at additional cost and services performed along with its normal business functions during the taxable years.

Moreover, the record shows clearly that the increased charges, collected and received by the taxpayer under authorization of the Commission, fall within none of the classifications enumerated by the taxpayer (Br. 44-48). Rather, as pointed out under Subheading A, *supra,* they were *earned* by the taxpayer's services rendered its subscribers during the taxable years involved; in earning such additional revenue, the taxpayer employed both capital and labor; and the Commission's decision specifically shows that the increased revenues were not to be treated as part of the taxpayer's invested capital (*Baboquivari Cattle Co.* v. *Commissioner, supra,* pp. 115-116), as would be the case if they were capital contributions, donations or subsidies (cf. *Brown Shoe Co.* v. *Commissioner,* 339 U. S. 583; *Texas & P. Ry. Co.* v. *United States,* 52 F. 2d 1040 (C.Cls.), affirmed, 286 U. S. 285; *Edwards* v. *Cuba Railroad,* 268 U. S. 628, cited by the taxpayer (Br. 44-45, 47-48)). For these reasons, it is clear that the facts herein have no likeness, analogy or similarity to those of the many irrelevant and inapplicable cases cited and relied on by the taxpayer (Br. 44-50).

In short, the taxpayer received the increased charges under the Commission's decision and order authorizing their collection from the subscribers during the taxable years (R. 21, 40-52, Ex. B, R. 86-87), and its right freely to retain and use them was, in so far as the record shows and contrary to the taxpayer's contentions (Br. 43), unfettered and absolute during the respective taxable years in which received—as well as thereafter. They were never refunded but rather, as heretofore

shown, after the taxpayer's full use and enjoyment thereof from 1941 until 1949, they were permanently allocated, under the Commission's directive, to the taxpayer's retirement pension fund maintained for its employees. (R. 29-32, 82, 94-96.) Under the rationale of *Commissioner* v. *Brooklyn Union Gas Co.*, 62 F. 2d 505 (C.A. 2d), *United States* v. *Lewis*, 340 U. S. 590, rehearing denied, 341 U. S. 923, and related cases, therefore, the increased charges in question were clearly includible and, under the District Court's decision, properly included in the taxpayer's gross income for both taxable years in which they were received, respectively (R. 96-99), under the provisions of Sections 22 (a), 41, 42 (a) and 48 of the Internal Revenue Code (Appendix, *infra*).

CONCLUSION

The judgment of the District Court is correct, and should therefore be affirmed upon review by this Court.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42 [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 42.)

* * * *

SEC. 48. DEFINITIONS.

When used in this chapter—

(a) *Taxable Year.*—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. * * *

(b) *Fiscal Year.*—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

(c) *"Paid or Incurred", "Paid or Accrued".*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * *

(26 US.C. 1946 ed., Sec. 48.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

* * * *

Sec. 19.22 (a)-5. *Gross income from business.*—In the case of a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of the goods sold, plus any income from investments and from incidental or outside operations or sources. * * *

Sec. 19.41-1. *Computation of net income.*—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduc-

tion is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. * * *

Sec. 19.41-4. *Accounting period.*—The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not established a fiscal year. (See section 48.) * * *

Sec. 19.42-1 [As amended by T.D. 5086, 1941-2 Cum. Bull. 38, 50, and T.D. 5233, 1943 Cum. Bull. 198, 199]. *When included in gross income.*—(a) *In general.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *

* * * *

The above-quoted provisions of Sections 19.22 (a)-1, 19.22 (a)-5, 19.41-1, 19.41-4 and 19.42-1 (as amended) of Treasury Regulations 103 are identical with the corresponding provisions of Sections 29.22 (a)-1, 29.22 (a)-5, 29.41-1, 29.41-4 and 29.42-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

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No. 13,284

United States Court of Appeals

For the Ninth Circuit

MUTUAL TELEPHONE COMPANY (a corporation),	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR MUTUAL TELEPHONE COMPANY, APPELLANT.

HEATON L. WRENN,
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REPLY BRIEF FOR MUTUAL TELEPHONE COMPANY, APPELLANT.

INTRODUCTION.

The amount involved in this case is $36,728.39 (plus interest), rather than $38,434.23 as stated on the first page of appellee's brief (R. 14, 28).

Appellee's brief makes two principal contentions in support of its argument that the District Court, below, did not err in holding that the increased installation and new supersedure charges were includable in appellant's taxable income in 1941 and 1942:

I. The increased charges in question were received by the taxpayer during the taxable years under a

claim of right and without restriction shown as to their use and disposition.

II. The increased charges in question clearly constituted taxable income to the taxpayer for the years 1941 and 1942, within the meaning of the Sixteenth Amendment.

In this reply brief we will answer these contentions and the arguments advanced in support thereof in that order.

ARGUMENT.

I. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES RECEIVED BY APPELLANT FROM ITS SUBSCRIBERS IN 1941 AND 1942 WERE NOT TAXABLE INCOME TO IT IN THOSE YEARS BECAUSE SUCH CHARGES WERE RECEIVED AND HELD IN THOSE YEARS SUBJECT TO A RESTRICTION AND WERE NOT SUBJECT TO APPELLANT'S UNFETTERED COMMAND.

The principal point at issue here is relatively simple—does the order of the Public Utilities Commission requiring appellant to segregate and retain in a liability or suspense account the amount of the increased charges collected from subscribers in 1941 and 1942 constitute a "restriction" as to the disposition thereof within the rule of *North American Oil Consolidated v. Burnet,* 286 U.S. 417?

It is our contention (Appellant's Brief 14, 22-26, 43) that the order of the Commission was a "restriction" which deprived appellant of the "unfettered command" over the amount credited to subaccount 175.2 and prevented appellant from deriving any

"readily realizable economic value" therefrom (*Corliss v. Bowers,* 281 U.S. 376, and *Rutkin v. United States,* 343 U.S. 130). The order was admittedly binding on appellant and the effect of it was to require appellant to keep on hand at all times in cash or marketable securities an amount equal to the amount credited to subaccount 175.2 which could be paid out for any purpose the Commission might direct. It cannot be denied that this was the practical effect of the Commission's order. The likelihood or remoteness of the possibility that appellant would be ordered by the Commission to repay the charges is not the significant point—the fact is that until the Commission entered a *final* order in 1949, appellant was in a state of suspense with respect to these charges and as a regulated public utility was obliged to have an equivalent amount on hand to pay out as the Commission might direct. The Commission's order was not something which could be complied with by a mere bookkeeping entry; it was a real restriction which required appellant to keep equivalent funds or securities on hand and in effect deprived appellant of any economic value it might otherwise have derived from the increased charges. *North American Oil Consolidated* and other taxpayers which received funds without restriction but which might subsequently have to be repaid could have paid out all their cash as dividends or for other corporate purposes without violating any order of a regulatory body or court; if appellant had done so it would have failed to comply with the obvious intent and purpose

of the Commission's order. In order to determine the meaning of the Commission's order it is only necessary to look at the Commission's action in 1948, when it directed transfer of $41,970.50 in cash (appellant having been "ordered to maintain this amount in Account No. 175.2 until further directed") to the "pension reserve" (R. 75-77 and footnote 3, p. 75). The Commission would certainly have considered it a violation of its order if appellant had replied that it could not transfer this cash because it had considered the order merely a "nicety of accountancy technique" or "jargon of bookkeeping" (Appellee's Brief, 16) and although it had set up the amount in subaccount 175.2 it had actually spent all its cash and marketable securities and had no funds left available to transfer to the pension reserve.

Appellee's brief ignores the practical effect of the Commission's order on appellant and relies on the fact that the physical moneys collected under the increased charges were used by appellant without regard to source to establish its contention that the Commission's order did not place any restrictions whatever on appellant's use and command of the increased charges in 1941 and 1942 (Appellee's Brief 18-30). Appellee treats the segregation of the increased charges in subaccount 175.2 as a bookkeeping entry which did not alter the taxable status of such increased charges in the years received (Appellee's Brief 19-20-21).

To accept appellee's argument would be to ignore the actualities of what the Commission's order re-

quired appellant to do and what it did do. Appellant does not controvert our contention that if the Commission's order had required the physical funds collected from the increased charges to be deposited in escrow or locked up in a bank, they would not be income to appellant in 1941 and 1942 (Appellant's Brief 25, 31). The only difference between this situation and what actually happened is that the Commission's order permitted appellant to use the physical funds while requiring it to account for the same and keep an equivalent amount on hand. The result in this case should not turn upon such a technicality.

In this case, the Commission's order allowed appellant to collect the increased charges *provided* it segregated them in a separate account. Of the numerous cases cited in appellee's brief (18-39) only two involve a similar situation—that is, where the taxpayer is permitted to receive money but subject to a restriction imposed by a court, regulatory body or binding contract. These cases are *Comm'r v. Brooklyn Union Gas Co.,* 62 F. (2d) 505 (1933) and *Agne v. United States,* 42 F. Supp. 66 (1941).

The parties differ as to the correct interpretation of the *Brooklyn Union Gas* case (Appellant's Brief 38-40; Appellee's Brief 25-29). Appellee states that the Court of Appeals for the Second Circuit affirmed the Board and held that the excess charges were taxable income to the taxpayer for the years in which the services were rendered (Appellee's Brief 26). However, we believe that although the Second Circuit affirmed the order of the Board, it did so on the

ground that all of the excess charges (except for $673,000, discussed below) were income in the years withdrawn from impoundment, rather than in the years earned as the Board concluded. Thus, the Second Circuit states: "While this case [*North American Oil Consolidated v. Burnet*] casts doubt upon the correctness of the Board's theory that the excess moneys are to be allocated to the years, respectively, when the gas was sold, it strongly supports the decision that final termination of the litigation was not the critical moment" (p. 506). It should be remembered that to *affirm* the Board's order it was only necessary for the Second Circuit to hold that the money was *not* income in 1922 when the litigation terminated—it was not necessary to decide whether it was income when the gas was sold or when it was released from impoundment. We are satisfied that the Second Circuit concluded that *North American Oil Consolidated v. Burnet* required that the money (except for the $673,000) be considered income when released from impoundment. This being the case, the situation with respect to Rate Cases No. 1 is merely an application of *North American Oil Consolidated v. Burnet* as pointed out in our brief (38-40). There was no *restriction* when the moneys were released from impoundment except the giving of the taxpayer's own bond or the bond of the parent which owned 100% of the stock of the taxpayer (22 B.T.A. 510), which added nothing to the contingent liability the taxpayer was under regardless of the bond.

With respect to Rate Cases No. 2 and particularly the $673,000 not withdrawn from impoundment, the Second Circuit's opinion is confusing. The court order in Rate Cases No. 2 permitted the excess charges to be withdrawn upon the deposit of "approved securities" or the giving of a "surety bond" —in each instance surety bonds were given (22 B.T.A. 513). Apparently the majority considered that the giving of a surety bond was not a restriction because it did not "add anything to the contingent liability they were under regardless of such bonds" (p. 506). Judge Learned Hand, who dissented in part, did not agree with this—the requirement of giving approved securities or a surety bond, as distinct from the taxpayer's own bond, does not make the excess charges immediately available, like cash on deposit. "I do not see how such moneys are any more received by the taxpayers, than if the court continued to impound them" (p. 507). It seems to us that Judge Hand was right, that the requirement of giving a surety bond was a real restriction which should have prevented the excess charges from becoming income (see comment 2 Merten's Law of Federal Income Taxation, page 309, footnote 3).

With respect to the $673,000, the majority of the Second Circuit seems to have held that this was income in the years the gas was sold, even though not withdrawn from impoundment, principally because the entire cost of furnishing the gas was charged to the year when the service was rendered and to credit the revenue to another year would unfairly distort

the taxpayer's income (p. 507). We think that this portion of the decision is contrary to *North American Oil Consolidated v. Burnet* because the excess moneys were subject to a restriction when earned. Furthermore, this portion of the decision is not applicable to our case because a substantial portion of the expenses attributable to the increased charges was not charged off in the year the revenues from the installations and supersedures were received (R. 25, 26).

In the *Agne* case, majority stockholders in 1922 sold stock which they had purchased from the minority for an insufficient consideration. In the same year Stappenback and other minority stockholders brought actions claiming fraud on them. The bulk of the proceeds of the sale was received by the majority stockholders without any restriction but the "small amount" of $12,000 was by court order subjected to a trust to satisfy the possible outcome of the Stappenback litigation. The case was heard before five judges of the Court of Claims. Judge Madden, who wrote the opinion, held that the entire amount of the proceeds of the sale, including the $12,000, was income to the majority stockholders in 1922. One concurring judge, who wrote an opinion, thought it was wrong to hold that under the circumstances the taxpayer had received earnings under a claim of right with full power of control and disposition. "The exercise of any such power over a portion, at least, of such funds was prevented by court order made in 1922" (42 F. Supp. 73). Nevertheless, he concurred in the result because the taxpayer was not equitably entitled to

recover since he sought to benefit from an illegal transaction. Since the other three judges of the court did not join in Judge Madden's opinion but merely "concurred", it is impossible to tell how the majority of the court felt on the question of the receipt of the $12,000 as income not subject to a restriction.

Lykes Bros. S.S. Co. v. Comm'r, 126 F. (2d) 725, cited by appellee (Appellee's Brief, 29) might have involved the receipt of moneys subject to a binding restriction if the mail carriage contract had required a portion of the mail "subsidies" to be deposited in a special fund, but both the Board (42 B.T.A. 1395, 1403) and the Fifth Circuit (126 F. (2d) 727) expressly found that the mail carriage contract contained no such requirement, and the case turned on this point. There is certainly a strong implication in the opinion of the Fifth Circuit that if the mail contract had contained such a requirement, the funds received would have been so "earmarked or fettered as not to have been really received as income" (p. 727).

Appellee states that *Penn v. Robertson,* 115 F. (2d) 167, is "indistinguishable" from this case (Appellee's Brief, 24), but as we have pointed out (Appellant's Brief, 42) the taxpayer in that case was entirely free to take up his stock allotment at any time during the taxable year; when the bonuses and dividends were credited to his stock account there was nothing which prevented him actually receiving them except the exercise of his right to take up his stock allotment, which was within his own discretion. This case does

not illustrate receipt of money subject to a restriction which cannot be avoided by the recipient.

The parties are in disagreement as to the meaning of this court's language in *Baboquivari Cattle Co. v. Comm'r,* 135 F. (2d) 114 (Appellant's Brief 19-20; Appellee's Brief 20-21). That case held that payments by the United States to a ranching corporation under the Soil Conservation and Domestic Allotment Act were income rather than capital subsidies. The taxpayer of its own volition entered the payments on its books as capital items. This court said:

> "No part of the sums paid to the petitioner were required to be placed by him in a particular account or fund. The payments were not earmarked, nor was there any restriction on their use. Petitioner was free to use the money for any purpose it might see fit, as to defray operating expenses or to pay dividends or to purchase an automobile. Obviously, the manner in which the taxpayer entered the items on its books is of no moment." (p. 116)

In our brief (19-20) we have referred to this case as showing a recognition by this court that money received subject to the restriction that it must be placed and held in a particular account is not income. If this is not correct, why did the court use the language quoted above? If the court had thought that a requirement that money be placed in a particular account or fund is of no significance, it would hardly have used this language. Appellee contends (20-21) that the basis of the decision was that there was not

any restriction on the use of the moneys, "as here". True, there was no restriction on the use of the funds and the court's decision is clearly correct on this point. But in the case at bar, there was a restriction —appellant might have used the physical currency received from the increased charges "to defray operating expenses or to pay dividends or to purchase an automobile" but it had to credit an amount equal to such collections to subaccount 175.2 and keep an equivalent amount of cash or marketable securities on hand to comply with the Commission's order. There was no such restriction imposed by a regulatory public authority on the Baboquivari Cattle Company. We believe that the decision of this court in the *Baboquivari* case is decisive on the issue as to whether the increased charges were income in 1941 and 1942. Since they were required to be placed in a particular fund and earmarked and their use restricted, the court has only to refer to its language noted above from the *Baboquivari* case to sustain a decision that the increased charges were not income in 1941 and 1942.

Appellee appears to feel (Appellee's Brief 18-19) that the status of the increased installation and supersedure charges as income is in some way affected by the following language in the Commission's first decision:

> "The increase over present charges would be credited to Account No. 175, Contributions to Telephone Plant, and in computing rates on an 'investment basis' would be a reduction from the net investment in arriving at a rate base. Inves-

> tors would not require a return and subscribers would be spared paying a capital charge on same." (R. 46)

This provision was certainly of no benefit to appellant as it would have meant lower rates if a rate base determination had been made during this period—in fact, none was made until 1948 when the Commission ordered the amount in subaccount 175.2 transferred (R. 29-31, 75-78). The Commission's action in 1948 shows that its earlier ruling that the amount in subaccount 175.2 would be a reduction in net investment in arriving at a rate base was merely temporary, since upon the transfer of the amount in subaccount 175.2 to the "pension reserve" and the elimination of the account (R. 30-32) there remained nothing to deduct from net investment in arriving at a rate base. The references in appellee's brief (18-19, 22) to the fact that under the Commission's first decision "the subscribers" would not require a return on the amounts in subaccount 175.2 are erroneous. The decision was that *investors,* not subscribers, would not require a return. Investors in a public utility company are obviously not the same people as subscribers to its services, and subscribers to a utility certainly do not require a return on utility property. The Commission's language in its first decision, quoted above, does not mean that the subscribers would not require return to them of the increased charges, as appellee contends (Appellee's Brief, 22), but that the stockholders of Mutual Telephone Company would not re-

quire a rate of return on that portion of its utility property represented by the amount in subaccount 175.2.

Appellee insists (Appellee's Brief 18, 36) that appellant received the increased charges under a claim of right because they were collected under authorization by the Commission. However, although appellant claimed the right to collect the increased charges, it did not claim the right to *keep* them at the time they were collected (Appellant's Brief 20-21). In *Sohio Corporation v. Comm'r,* 163 F. (2d) 590, the taxpayer was clearly authorized by state law to collect the funds but it disclaimed any right to keep them and, therefore, was held not to have received them under a "claim of right". In the "claim of right" cases cited in appellee's brief (33-39) the taxpayer not only claimed the right to collect the money but also the right to keep it. As pointed out in our brief (20-21) appellant never claimed the additional charges were required as additional revenue and did not know whether it would be allowed to retain them or not. Prior to its petition to discontinue the increased charges in April, 1942, appellant made no attempt to establish any right to keep them (R. 56-57) and the Commission then rejected appellant's effort to "recapture" them (R. 60-61). Appellant's purpose in instituting the new charges would have been satisfied if they had deterred new telephone subscriptions, whether or not appellant was allowed to keep the added charges (R. 85). The Commission's

original decision (R. 46) merely provided that the amounts collected be set up in a separate account and that "on motion of the Commission or upon application of the Company, other disposition of the accrued balance might be made as conditions warranted." The Commission's second decision in July, 1942 used similar language (R. 61) and the Commission's second order entered July 15, 1942 *for the first time* used the language that the additional charges "shall not be taken into the income account until such time as the Commission may authorize such action" (R. 64).

Appellee's brief disposes of the cases cited in our brief illustrating receipts under a restriction (Appellant's Brief 31-35) merely by saying that they are not in point (Appellee's Brief, footnote 2, p. 25). These cases are in point to the extent that each of them dealt with the receipt of funds subject to a restriction, which is the issue in this case. None of the cases cited by appellee in its brief (18-39) deal with funds received subject to a restriction, except the *Brooklyn Union Gas* case and *Agne v. United States, supra.* In all of the other cases there were no limitations whatever on the taxpayer's right to use the funds as it saw fit and no requirements by regulatory bodies or others that an equivalent amount be held available at all times.

Appellee's brief cites cases for a number of propositions to which we have already agreed, i.e., the possibility that money received will subsequently have to be repaid is not sufficient to keep it out of income

in the year received (Appellee's Brief 23, 29, 30, 34, 35, 38; Appellant's Brief 29-30); the fact that the system of annual accounting is necessary for the collection of income taxes (Appellee's Brief 30-35; Appellant's Brief 42-43); the fact that *North American Oil Consolidated v. Burnet* is still law (Appellee's Brief 35-39; Appellant's Brief 16, 29). There being no dispute on these points, we see no reason to discuss these cases in this reply brief.

We are not clear from the discussion in appellee's brief beginning with the last paragraph on page 30 whether appellee is asserting that under the annual accounting principle and under Sections 41 and 42 of the Internal Revenue Code, it is necessary to allocate the increased charges in this case to 1941 and 1942 even though they may have been received subject to restriction and not held subject to appellant's unfettered command. Such a contention we consider demonstrably unsound because it flies in the teeth of the language used by the court in *North American Oil Consolidated v. Burnet* (quoted pp. 16-17 Appellant's Brief and pp. 33-34 Appellee's Brief), a case otherwise relied on repeatedly in appellee's brief (23, 33, 36-39), and in the earlier case of *Corliss v. Bowers, supra,* (see discussion our brief 16-20, 42-43). Funds received under a claim of right *and without restriction as to their disposition* are income in the taxable year received by the taxpayer, but funds received *subject to a restriction* are not income until the restriction is removed (*North American Oil Con-*

solidated v. Burnet, Corliss v. Bowers, and cases cited pp. 31-35 our brief). *Burnet v. Sanford & Brooks Co.,* 282 U.S. 359, relied on by appellee to support the annual return principle came *before North American Oil Consolidated v. Burnet* and cannot be said to qualify it. The pertinent language in Sections 41 and 42 of the Internal Revenue Code has been in corresponding sections of the Income Tax Acts for many years and Sections 41 and 42 were in the law when Justice Brandeis delivered his opinion in *North American Oil Consolidated v. Burnet.*

Since items received under a restriction are not gross income until the restriction is removed, the annual accounting theory and Sections 41 and 42 cannot be applied until that time. Another analysis leading to the same result is that a taxpayer on the accrual basis (as is appellant—R. 27) cannot accrue income until the *right* to receive it becomes fixed and definite irrespective of the time when the money is actually received. *Spring City Foundry Co. v. Comm'r,* 292 U.S. 182, 184 (1934). The right to money received subject to a restriction does not become fixed and definite until the restriction is removed and it is improper to *accrue* the item as income prior to that time. It should be noted that the Treasury Regulations themselves recognize that the absence of a restriction is necessary to permit an item to be classified as gross income. Regulations 111, Section 29.41-2 state in part: "A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him *without restriction*" (italics supplied) (Appendix, *infra*).

II. THE INCREASED INSTALLATION AND NEW SUPERSEDURE CHARGES ARE NOT TAXABLE INCOME TO APPELLANT IN 1941 AND 1942, OR IN ANY OTHER YEARS, BECAUSE THEY DO NOT CONSTITUTE "INCOME" WITHIN THE MEANING OF THE SIXTEENTH AMENDMENT.

Appellee, somewhat heatedly, rejects our contention that the increased installation and supersedure charges are similar to subscribers' contributions for line extensions (which are not taxed as income) and thus are not includable in appellant's taxable income (Appellee's Brief 39, 40). Appellee's reasons for urging that the increased installation and supersedure charges are *not* similar to contributions for line extensions are set forth on page 43 of its brief and are as follows:

1. The increased charges were *earned* by appellant's services rendered to subscribers during the taxable years involved and in earning the additional revenue, appellant employed both capital and labor. But we have pointed out (Appellant's Brief, 49) that the Cuba Railroad Company in *Edwards v. Cuba Railroad,* 268 U.S. 628, likewise had to "earn" the subsidy by building the railroad line and expending its capital and labor. Similarly, in many of the line extension and spur track cases cited in our opening brief (45) the taxpayer had to build the line or track by utilizing its capital and labor to become entitled to the contribution. Therefore, these factors cannot be considered significant in determining whether payments of this sort are taxable income.

2. The Commission's decision shows that the increased revenues were not to be treated as part of appellant's invested capital, as were the contributions,

donations or subsidies in *Brown Shoe Co. v. Comm'r,* 339 U.S. 583, *Texas & P. Ry. Co. v. United States,* 286 U.S. 285, and *Edwards v. Cuba Railroad, supra.* But we have shown that it is not necessary for payments of this nature to be treated as part of the taxpayer's invested capital or be earmarked for or applied specifically against capital improvements (Appellant's Brief, 50). What difference does it make that the payments are denominated "contributions to capital" if they can in fact be used by the taxpayer for any purpose? *Texas & P. Ry. Co., supra,* distinguishes *Edwards v. Cuba Railroad* on the ground that in the latter case the payments were conditioned upon construction work performed (286 U.S. 289, 290). So, in our case the increased revenues were dependent upon installing and connecting instruments, part of which work constituted a capital expenditure (R. 25).

Our reasons for stating that the additional installation charges are similar to contributions for line extensions are that both are payments made by appellant's subscribers for the installation or connection of telephone facilities rather than for ordinary telephone service and that both are "windfalls" to appellant. In the former case the subscriber builds an extension and gives it to appellant or reimburses appellant for building it; in the latter case appellant receives an extra payment to which it is not entitled as ordinary revenue (R. 45) and does not perform any work or services (except billing and accounting) in addition to those it would have to perform anyway (R. 26-27).

The additional charges were not intended as a supplement to or substitute for regular income as in *Texas & P. Ry. Co. v. United States, supra,* and *Helvering v. Claiborne-Annapolis Ferry Co.,* 93 F. (2d) 875. When the additional charges were received in 1941 and 1942 they were required to be placed in a particular fund or account and, thus, were not like the unrestricted payments to the taxpayers in *Baboquivari Cattle Co. v. Comm'r, supra,* and *Lykes Bros. S.S. Co. v. Comm'r, supra.*

CONCLUSION.

For the reasons stated in our opening brief and in this reply brief, the increased installation and new supersedure charges were *not* taxable income to appellant in 1941 and 1942 and the judgment of the District Court, below, was erroneous and should be reversed and that Court directed to enter judgment for appellant accordingly.

Respectfully submitted,

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Attorneys for Mutual Telephone Company, Appellant.

Dated, Honolulu, Hawaii,
July 10, 1952.

(Appendix Follows.)

Appendix.

Appendix

Treasury Regulations 111

"*Sec. 29.41-2. Bases of computation and changes in accounting methods.*—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of 'paid or accrued' and 'paid or incurred'. All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 29.42-2 and 29.42-3.) On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. (But see section 29.22(c)-5.)

* * *"

(The above quoted provision is identical with the corresponding provision of Section 19.41-2 of Treasury Regulations 103.)

No. 13286

United States
Court of Appeals
for the Ninth Circuit.

HASTORF-NETTLES, INC., a Corporation, and UNITED PACIFIC INSURANCE COMPANY, a Corporation,

Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's & Harbor Workers' Compensation Act, and the Defense Bases Act, and CECIL VOGEL,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13286

United States Court of Appeals for the Ninth Circuit.

HASTORF-NETTLES, INC., a Corporation, and UNITED PACIFIC INSURANCE COMPANY, a Corporation,

Appellant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's & Harbor Workers' Compensation Act, and the Defense Bases Act, and CECIL VOGEL,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

KEITH, CREEDE & SEDGWICK,
FRANK J. CREEDE, ESQ.,
220 Bush Street,
San Francisco, Calif.,

For Appellants.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney,
CHARLES ELMER COLLETT, ESQ.,
Assistant United States Attorney,
San Francisco, California,

For Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 30853

HASTORF-NETTLES, INC., a Corporation, and UNITED PACIFIC INSURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,

Defendants.

COMPLAINT TO REVIEW COMPENSATION ORDER AND FOR INJUNCTION

To the Honorable United States District Court for the Northern District of California, Southern Division:

Come now United Pacific Insurance Company, a corporation and Hastorf-Nettles, Inc., a corporation and present this their complaint for review and injunction and in support thereof respectfully allege:

I.

That the Court has jurisdiction of this cause of action by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation

Act, Title 33, Section 901 et sequitur, U. S. Code 44 Stat. 1424, and particularly by reason of Section 921 (B) thereof, as extended by title 42, U. S. Code Sections 1651-1654 (Defense Bases Act). Both of these statutes are hereinafter referred to as "The Act."

II.

That Hastorf-Nettles, Inc., is a corporation and was at all times mentioned an employer within the provisions of said Act; that at all times herein mentioned United Pacific Insurance Company was its insurance carrier, lawfully carrying on the business of workmen's compensation insurance in the Thirteenth and Fourteenth Compensation Districts and was at all times herein mentioned duly authorized to insure the business of employers under the provisions of the act.

III.

That Warren H. Pillsbury is now, and was at all times herein mentioned the Deputy Commissioner of the United States Compensation Commission for the Thirteenth Compensation District under the Act having offices at San Francisco, California; that Cecil Vogel on September 4, 1950, was employed by Hastorf-Nettles, Inc., under a Public Works Contract of the United States in the territory of Alaska and on said date received injuries which it is alleged arose out of and were within the course and scope of his employment by said Hastorf-Nettles, Inc.

IV.

That following the injury a claim was filed by the said Cecil Vogel in the Fourteenth Compensation District; that thereafter the claim was by order regularly and duly made transferred by the United States Employees Compensation Commission to the Thirteenth Compensation District and to the Deputy Commissioner, Warren H. Pillsbury, the deputy in charge of said district for hearing and determination; that a hearing was held in Oakland, California and oral and documentary evidence received; that the case was thereafter submitted for decision and on the 17th day of August, 1951, a Compensation Order and Award of Compensation was made by defendant Warren H. Pillsbury, Deputy Commissioner; that a copy of said Compensation Order and Award of Compensation is attached hereto, made a part hereof and marked "Exhibit A"; that among other things said Warren H. Pillsbury found as follows:

"That on September 4, 1950, the claimant above-named was in the employ of the employer above-named for the performance of service at a Defense Base and on a Public Works Contract of the United States in the territory of Alaska in the 14th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Acts of Congress of August 16, 1941, and December 2, 1942, and that the liability of the employer for compensation under said Acts was insured by United Pacific Insurance Company; that on the said date claimant was quar-

tered by the employer at a labor camp in a military reservation near Anchorage, Alaska, which bears the name of Fort Richardson; that the employer did not provide recreational facilities for its employees at said labor camp or on said military reservation and that recreational facilities for such employees at said places did not in fact exist; that the employer herein was a subcontractor at said time and place of one Pomeroy and Company; that said prime contractor provided the transportation by automobile for said subcontractor and its employees as needed in the course of its operation; that it was customary for Pomeroy and Company drivers, as well as drivers of other cars and trucks, to pick up and give a ride to any workman on said base, whom they might pass and who were going in the same direction irrespective of whether such workmen were going on business or otherwise; that on the said 4th day of September, 1950, which was a holiday, Labor Day, claimant for recreation went by train from Anchorage to a fair being held at Palmer, Alaska, about forty miles away, and on leaving said fair he was given a ride from Palmer back to Fort Richardson by a Superintendent of Pomeroy and Company in a Pomeroy Company truck which the latter had had assigned to him; that said truck met with an accident within the confines of Fort Richardson, in which claimant sustained the injuries which form the basis of the present claim for compensation; that the situs of said accident was on the main highway from Palmer through Fort Richardson to Anchorage, between the

place where claimant performed his work and the labor camp where he was housed, and two or three miles before reaching the latter; that therefore claimant's injury arose out of and in the course of his employment with the employer herein;"

That on the basis of said finding the said Deputy Commissioner made the following award to claimant herein:

> "That the employer, Hastorf-Nettles, Inc., and the insurance carrier, United Pacific Insurance Company, shall pay to the claimant the sum of $1085.00 forthwith and the further sum of $35.00 a week, payable in installments each two weeks beginning April 10, 1951, subject to defendant's credit for third party suit recovery by claimant in the amount of $5,000.00."

V.

That there is no evidence in the record of said proceeding to support the finding that the claimant was entitled to an award as a result of the incident of September 4, 1950; that on the contrary the evidence shows as a matter of law that the claimant was injured while outside the course and scope of his employment and that no casual connection exists between the employment and said injury.

VI.

That if plaintiffs are compelled to pay the said award to the said Cecil Vogel, they will suffer irreparable damage; that if plaintiffs are required

to pay said compensation prior to determination of this action it will allow defendant Cecil Vogel to disburse said compensation prior to the determination thereof and if this action should be determined in favor of plaintiffs herein and the award set aside, plaintiffs would have no remedy in law or equity for the recovery of said payments so made in pursuance of said order; that the said Cecil Vogel will not suffer harm if his right to compensation payments is suspended pending the review of the compensation order and award by this Court; that in order to prevent irreparable damage to plaintiffs it is necessary that said award be stayed pending the outcome of the above-entitled action and plaintiffs are entitled to have said Deputy Commissioner restrained from enforcing the payment of said award pending the outcome of said action.

VII.

That although a credit of $5,000.00 exists against the award, said award is continuing in nature; that plaintiff believes that the amount it may be required to pay in conformance with said award will greatly exceed the sum of $5,000.00. That under the terms of the Act, plaintiff must appeal from said award within thirty days; that plaintiff therefore alleges that its only remedy is to make this complaint for injunction at the present time.

Wherefore plaintiffs pray as follows:

That said compensation order and award be set aside and the same and its enforcement be premanently enjoined and restrained;

That in addition said compensation order be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this action;

That payments required by said order and award, and each of them, be stayed until final decision herein;

That this Court find and adjudge that plaintiffs should not be, nor is either of them, subject to or liable to pay compensation because of the aforesaid injuries to the said Cecil Vogel;

And for such other and further relief as to the Court may seem just.

KEITH, CREEDE &
SEDGWICK,

By /s/ FRANK J. CREEDE,
Attorneys for Plaintiffs.

EXHIBIT "A"

U. S. Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District

Case No. DB-14-1125-2

In the matter of

The Claim for Compensation Under the Acts of Congress of August 16, 1941 and December 2, 1942, extending the Longshoremen's and Harbor Workers' Compensation Act.

CECIL VOGEL,

Claimant.

against

HASTORF-NETTLES, INC.,

Employer.

UNITED PACIFIC INSURANCE COMPANY,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Claim for compensation having been filed herein under the Acts of Congress of August 16, 1941, and December 2, 1942, for an injury occurring in the course of an employment on a military, air or naval base of the United States outside the continental United States, in the Territory of Alaska, in the 14th Compensation District, and said claim having been transferred to the undersigned Deputy Commissioner of the 13th Compensation District, by the

Deputy Commissioner of said 14th Compensation District, with the approval of the Bureau of Employees' Compensation, and such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on September 4, 1950, the claimant abovenamed was in the employ of the employer abovenamed for the performance of service at a Defense Base and on a Public Works Contract of the United States in the Territory of Alaska in the 14th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Acts of Congress of August 16, 1941, and December 2, 1942, and that the liability of the employer for compensation under said Acts was insured by United Pacific Insurance Company; that on the said date claimant was quartered by the employer at a labor camp in a military reservation near Anchorage, Alaska, which bears the name of Fort Richardson; that the employer did not provide recreational facilities for its employees at said labor camp or on said military reservation and that recreational facilities for such employees at said places did not in fact exist; that the employer herein was a sub-contractor at said time and place of one Pomeroy and Company; that said prime contractor provided the transportation by automobile for said subcontractor and its employees

as needed in the course of its operation; that it was customary for Pomeroy and Company drivers, as well as drivers of other cars and trucks, to pick up and give a ride to any workman on said base, whom they might pass and who were going in the same direction, irrespective of whether such workmen were going on business or otherwise; that on the said 4th day of September, 1950, which was a holiday, Labor Day, claimant for recreation went by train from Anchorage to a fair being held at Palmer, Alaska, about forty miles away, and on leaving said fair he was given a ride from Palmer back to Fort Richardson by a Superintendent of Pomeroy and Company in a Pomeroy Company truck which the latter had had assigned to him; that said truck met with an accident within the confines of Fort Richardson, in which claimant sustained the injuries which form the basis of the present claim for compensation; that the situs of said accident was on the main highway from Palmer through Fort Richardson to Anchorage, between the place where claimant performed his work and the labor camp where he was housed, and two or three miles before reaching the latter; that therefore claimant's injury arose out of and in the course of his employment with the employer herein; that said injury consisted in fracture at the base of the odontoid process of the cervical vertebra, a fracture of the left scapula through the body and a fracture of the left scapula medial to the glenoid fossa and other injuries; that the employer did not furnish medical treatment, etc., in accordance with Section

7(a) of the said Act, and the defendants are liable therefor to claimant in the reasonable amount expended by him for self-procured medical treatment, the amount to be fixed by further proceedings if the parties are unable to agree thereon that the average weekly wage of the claimant herein at the time of his injury amounted to $200.00; that as a result of the injury sustained claimant was wholly disabled from the date thereof and he is entitled to compensation therefor at $35 per week for such disability; that the amount accrued to and including the date of the last hearing, April 9, 1951, 31 weeks, is $1085.00, no part of which has been paid; that claimant is entitled to payment hereafter at the rate of $35.00 a week, payable in installments each two weeks until the termination of his disability or the further order of the Deputy Commissioner; that claimant has instituted a third party suit for damages for said injuries against Pomeroy and Company which has been settled for $5000.00 with the written consent of defendants herein, that claimant's costs and attorneys' fees paid by him in said proceeding amounted to $1500.00, claimant's net recovery being $3500.00; that defendants are entitled to credit against compensation herein awarded in said sum of $5,000.00.

Upon the foregoing facts the Deputy Commissioner makes the following;

Award

That the employer, Hastorf-Nettles, Inc., and the insurance carrier, United Pacific Insurance Com-

pany, shall pay to the claimant the sum of $1085.00 forthwith and the further sum of $35.00 a week, payable in installments each two weeks beginning April 10, 1951, subject to defendant's credit for third party suit recovery by claimant in the amount of $5,000.00.

Given under my hand at San Francisco, California this 17th day of August, 1951.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

DMP;ki;sh

Every payment awarded under a Compensation Order earns 20% additional if not paid within 10 days from the date it becomes due.

Proof of Service

I hereby certify that a copy of the foregoing Compensation Order, Award of Compensation was sent by registered mail to the claimant, the employer and the insurance carrier at the last known address of each as follows:

Mr. Cecil Vogel, 2955 Morgan Avenue, Oakland, California; Hastorf-Nettles, Inc., 140 Hawthorne, San Francisco, California; United Pacific Insurance Co., 206 Sansome St., San Francisco, California.

By regular mail to:

Hastorf-Nettles, Inc., Pouch 2, Anchorage, Alaska; United Pacific Insurance Co., 400 Exchange

Building, Seattle, Wash.; Smith & Parrish, Attorneys, Financial Center Bldg., Oakland, Calif.

Attention: Mr. James B. Schnake, Attorney; Keith, Creede & Sedgwick, Attorneys, 220 Bush St., San Francisco, Calif.; U. S. Department of Labor, Bureau of Employees' Compensation, Washington, 25, D. C.

Mailed .....

....., Deputy Commissioner.

[Endorsed]: Filed August 29, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant, Warren H. Pillsbury, Deputy Commissioner of the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor, by his attorneys, Chauncey Tramutolo, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, for the Northern District of California, moves this Court to dismiss the Bill of Complaint for the following reasons:

(1) That the Bill of Complaint filed herein does not state a cause of action, and does not entitle plaintiffs to any relief, nor does the said Bill of Complaint state a cause of action against the de-

fendant, Warren H. Pillsbury, Deputy Commissioner, upon which relief can be granted.

(2) That it appears from the Bill of Complaint, including the transcript of testimony taken before Deputy Commissioner Warren H. Pillsbury, the Compensation Order filed by him on the 17th day of August, 1951, complained of in the Bill of Complaint, was supported by substantial evidence on the record as a whole, and under the law said findings of fact should be regarded as final and conclusive.

(3) That it appears from the Bill of Complaint, including said transcript of testimony, that said Compensation Order complained of herein is in all respects in accordance with law.

(4) For such other good and sufficient reasons as may be shown.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney, Attorneys for Defendant, Warren H. Pillsbury.

This motion will be based on the complaint and pleadings now on file in this matter and the certified copy of the transcript of the proceedings in the case before Deputy Commissioner Warren H. Pillsbury, which defendant intends to introduce in evidence as defendant's Exhibit A.

[Endorsed]: Filed November 16, 1951.

RESPONDENT'S EXHIBIT A

U. S. Department of Labor
Bureau of Employees' Compensation

Case No. DB-14-1125-2

In the Matter of

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

CECIL VOGEL,

Claimant,

vs.

HASTORF-NETTLES, INC.,

Employer,

UNITED PACIFIC INSURANCE CO.,

Carrier.

PROCEEDINGS

Monday, 18 December, 1950

Met, pursuant to notice, at 10:30 a.m.

Before: Warren H. Pillsbury,
Deputy Commissioner of the Thirteenth Compensation District.

Appearances:

For the Claimant:

MESSRS. SMITH & PARRISH, by
JOSEPH E. SMITH, ESQ.,

For the Employer:

KEITH, CREEDE & SEDGWICK, by
GORDON S. KEITH, ESQ.

Respondent's Exhibit A—(Continued)

The Deputy Commissioner: Hearing on claim for compensation.

Claimant is present in person and represented by Smith & Parrish, Attorneys at Law, Mr. Joseph Smith appearing.

Defendant is represented by Keith, Creede & Sedgwick, Mr. Gordon S. Keith appearing.

In this case, pre-hearing conference shows that the claimant was injured in Alaska on September 4, 1950. The claim is within the provisions of the Defense Bases Compensation Act, Acts of Congress of August 16, 1951, and December 2, 1942, extending the provisions of the Longshoremen's and Harbor Workers' Compensation Act to employees of air and military bases of the United States outside of the Continental United States.

The claim is within the primary jurisdiction of the Deputy Commissioner of the Fourteenth Compensation District with Headquarters at Seattle, Washington, but has been transferred by him to me for hearing and decision, with approval of the Bureau of Employees' Compensation because of the residence of the claimant at Oakland, California.

Pre-hearing conference has been held, which shows an issue of law and fact which cannot be adjusted informally.

The following facts are agreed to by the parties:

Claimant Vogel was in the employ of the defendant, Hastorf-Nettles, Inc., at Fort Richardson, Alaska on said date as a [4*] steam-fitter and at

*** Page numbering appearing at top of page of original Reporter's Transcript.**

Respondent's Exhibit A—(Continued)

said time, said employer had secured its liability for payments of compensation under the Defense Bases Compensation Act and Longshoremen's and Harbor Workers' Act by insurance in defendant, United Pacific Insurance Company.

Second, that claimant was engaged in work at a defense base and on a Public Works Contract of the United States, and the claim is within the provisions of said Acts and the jurisdiction of the appropriate Deputy Commissioners; that said claimant was injured on said date and that said injury has caused disability continuing to the present time—correction, temporary total disability continuing to the present time and for a period of time in the future not here determined.

Next, medical treatment was furnished in part by defendants.

If an award is entered in favor of claimant, it may direct reimbursement of claimant's reasonable medical expenses thereafter incurred by him.

Claimant's average weekly earnings may be taken at $200.00. No compensation has been paid.

The principal, if not the sole issue is whether the claimant's injury arose out of and in the course of his employment.

Any other issues, Mr. Keith?

Mr. Keith: No.

Mr. Smith: We have two files in our office. I grabbed one and there are no medical reports in it.

The Deputy Commissioner: Mr. Keith, will you tell the [5] United Pacific Insurance Company that I want the medical file first in each case?

Respondent's Exhibit A—(Continued)

Mr. Keith: They haven't the file.

The Deputy Commissioner: The medical record should be compiled at the Base.

Mr. Keith: They haven't received the file, Mr. Pillsbury.

The Deputy Commissioner: Mr. Smith, can you send me, within two weeks, a copy of the medical report?

Mr. Keith: The only thing I have in my file is that first report of the employer.

The Deputy Commissioner: Mr. Vogel, will you raise your right hand and be sworn?

Thereupon,

CECIL VOGEL

the claimant herein, was called as a witness for and in his own behalf, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and, upon examination, testified as follows:

Examination

By the Deputy Commissioner:

Q. Your name is Cecil Vogel? A. Yes.

Q. And your home is at 2955 Morgan Avenue, Oakland, California? A. Correct, sir. [6]

Q. You were working, were you, as a steamfitter at Fort Richardson, Alaska on or about the 4th day of September of this year? A. Yes.

Q. And you met with an injury at that time, did you? A. Yes, sir.

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

Q. And what were the circumstances of the injury? A. How do you mean, sir?

Q. What were you doing at the time, first?

A. Well, just to make a long story short, we caught a train and went to Palmer. That was Labor Day.

Q. That was from Anchorage to Palmer?

A. Yes.

Q. You were stationed at Fort Richardson?

A. Right on the Base. We were in a labor camp.

Q. Is that at or near Anchorage?

A. I think it is five or six miles from Anchorage.

Q. Continue.

A. So, on Labor Day, we took the train from Anchorage to Palmer to the fair they had there—the Exposition Fair.

Q. There was an Exposition at Palmer?

A. Yes.

Q. How far is that from Anchorage?

A. I think about 45 miles—something like that.

Q. Then what happened? [7]

A. Well, we came back from the fair and back into town. The fair was on the outskirts of town, I would say, a quarter of a mile or something like that, and we came back and met the carpenter superintendent from Pomeroy. He says, "Where are you going?" "It's just about our train time," I said, "we'll have to go catch our train. He said,

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

"I know a good place to eat out here, and you can ride back with me." And we rode back with him.

Q. And you went out with him and ate?

A. Yes.

Mr. Smith: On the way back from the fair, they were in an automobile accident.

The Witness: That is all there was to it. On the way back, we were in a wreck.

Q. (By the Deputy Commissioner): What was that about eating?

A. We had dinner at this place.

Q. The defendant's place?

A. No, a place out of Palmer.

Q. The "Drift Inn," wasn't it?

A. I don't know the name—about ten miles out of Palmer.

Q. And then the carpenter superintendent of the Pomeroy Company brought you back. Was it in a truck? A. A pick-up truck. [8]

Q. And what did you do next, after you got into the truck? A. What do you mean, sir?

Q. Did anything happen before the accident, after you got in the truck?

A. Not that I know of.

Q. You said something about him taking you to his place for dinner.

A. No, it was a regular restaurant. He lived on the same Base I lived on at the labor camp.

Q. And where did the accident happen?

A. Well, it was on Fort Richardson Base.

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

Q. Inside the reservation at Fort Richardson?

A. Yes.

Q. How far from your living quarters?

A. Well, I don't know just how far it was. I imagine it was a couple of miles from where we lived.

Q. What route had you taken back from Palmer?

A. The regular highway. I don't know what the name was.

Q. From Anchorage?

A. No, we were going to Anchorage. We were going through the Base when it happened.

Q. You hadn't reached Anchorage yet?

A. No.

Q. You said you got inside the military base known as [9] Fort Richardson? A. Yes.

Q. Where were your living quarters with reference to that? A. They were on the base.

Q. Do you know what the relationship is, if anything, with the Pomeroy Company—what the relationship is between Hastorf-Nettles and Pomeroy Company?

A. No relationship excepting contracting with one another. They had a sub-contract with the Pomeroy Company.

Q. Had you ever ridden before in any Pomeroy Company trucks or autos?

A. Yes, I was riding all the time. I was going back and forth to work, in one of their trucks.

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

Q. Where was the place your work was being done at that time? A. Fort Richardson.

Q. How far from your camp?

A. I think about seven miles.

Q. You say the Pomeroy trucks took you back and forth from the camp to your place of work?

A. That is right.

Q. Did you have occasion to use Pomeroy trucks or autos farther than that, or any other way?

A. No, I didn't. I didn't have no other privilege. No. [10]

Q. Are any of the trucks—Pomeroy trucks—made available for the men for pleasure trips after hours? A. That I couldn't answer.

Q. Do Hastorf-Nettles have trucks of their own to take men back and forth?

A. No, I can't answer that. I don't know the situation. I know the trucks we were riding in were regular army trucks.

Q. Did you ever ride back and forth in Hastorf-Nettles trucks as distinguished from Pomeroy trucks? A. Yes, we used either trucks.

Q. Either control?

A. Yes, that is right, sir.

The Deputy Commissioner: Mr. Smith?

Direct Examination

By Mr. Smith:

Q. Now, these quarters where you lived were furnished by Hastorf-Nettles?

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

A. That is true.

Q. And were they in a section of camp—that is, a section Camp Richardson by themselves?

A. Well, they were more or less for the working men that were on these jobs. The military personnel wasn't supposed to be on that section of the base at all.

Q. Were there any recreation facilities supplied for the labor at the camp itself? **[11]**

A. At the time, no.

Q. (By the Deputy Commissioner): Do you know whether you were assigned to the camp by Hastorf-Nettles or Pomeroy?

A. Hastorf-Nettles,; but I think Pomeroy had full charge of it. I don't know.

Q. Do you know which company?

A. My card was put out by Pomeroy that allowed me in and out of the base.

The Deputy Commissioner: Go ahead, Mr. Smith.

Q. (By Mr. Smith): Was the labor camp separated from the rest of the camp by any fence or enclosure of any sort? A. No.

Q. Camp Richardson itself was enclosed by barbed wire or some sort of enclosure?

A. Yes, either direction you came from, you had to go through the inspection post before you could enter.

Q. And in order to get through the inspection post, you had to have a card?

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

A. That is right.

Q. Who was this card that you had issued by?

A. Pomeroy. They were the main instigators of the cards.

Q. Now, were there any recreation facilities on Camp Richardson itself for the military [12] personnel?

A. That is something I can't answer because I was there such a short time that I don't know. I couldn't say.

Q. You don't know?

A. No. I wasn't there long enough.

Q. How long had you been there before this accident occurred?

A. We got there Sunday and I went to work Monday. I worked one week.

Q. During that week, were you aware of any recreation facilities on the base that were made available to you? A. No.

Q. Now, this accident that occurred, that happened on Camp Richardson base?

A. That is right.

Q. And you were on your way to your labor camp at that time? A. Yes.

Q. (By the Deputy Commissioner): What time of day was the accident?

A. It was in the evening.

Q. Of Labor Day? A. Yes.

Q. That was a holiday from work, wasn't it?

A. Yes. [13]

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

Q. (By Mr. Smith): Now, did Hasdorf-Nettles supply the people in the labor camp with any transportation into town? A. No.

Q. How were the men supposed to get from camp to town?

A. They had a bus running from the base to town that we could catch whenever we wanted to, or taxi.

Q. Was that a Camp Richardson truck? Was it army transportation?

A. No, it was a city bus that came out.

Q. And do you know whether or not there were any cars available—cars that belonged to Hasdorf-Nettles or cars that belonged to Pomeroy to take men into town if they wanted to go?

A. If there were some, I don't know of it.

Q. Now, what was the name of the gentleman with whom you were riding on this day?

A. Rudolph Buhlman—B-u-h-l-m-a-n.

Q. And he was employed by Pomeroy?

A. Correct.

Q. And the truck he was operating on this occasion was owned by Pomeroy? A. Yes.

Q. Do you know whether this truck was assigned to him for his personal use?

A. Well, yes, it was.

Q. And when this accident happened, do you know whether—— [14]

Mr. Smith: Withdraw that.

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

Q. What time were you supposed to be ready for work after Labor Day? Were you to work Labor Day evening or were you to report to work the next morning?

A. The next morning—Tuesday morning.

Q. And approximately what time did this accident happen?

A. I would say around 10:30 or 11:00 o'clock.

Q. In the evening? A. Yes.

Q. (By the Deputy Examiner): Do you know whether the train between Anchorage and Palmer runs on regular schedule or irregular?

A. No, it runs regularly.

Q. Does it keep on schedule?

A. Well, I don't know. I wasn't up there long enough to know.

The Deputy Commissioner: I have been told that the schedule is very irregular.

The Witness: Well, that day it was right on time. We left there at 10:00 in the morning and at 6:30 it pulled out just like our tickets read.

Q. (By Mr. Smith): When you take the train back to Anchorage from Palmer, how do you get back on the base?

A. Either have to catch the bus or taxicab. [15]

Q. And at the hour of 10:00 o'clock at night, do the busses run regularly?

A. They run about every half hour or hour. I am not sure what the time was on that.

Q. Do most of the people that work in the labor

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

camp go between Anchorage and the labor camp by bus or is it the custom that they go in by company vehicles?

A. Most of them—well, like I say, the short time I was there, we mostly rode the bus. There was a few fellows that had their own cars, but I didn't know that. You know, I hadn't been there long.

Q. Had you ridden in the car with this Rudolph Buhlman before this time? A. No.

Q. Was this road on which you had the accident one of the main roads to the station?

A. Yes.

Q. And is it a road that you would have to go over in going from your camp to the particular job on which you were working?

A. Same road.

Q. And as I understand, when the accident happened, your car went off the road and over the bank?

A. Yes, as far as I know. Whether there was any bank there, I don't know. [16]

Q. But it went off the road? A. Yes.

Q. (By the Deputy Commissioner): Where were you treated for your injuries?

A. At the Providence Hospital in Anchorage.

Q. That is a private hospital?

A. I guess so.

Q. Or an army hospital?

A. No, it was, I guess you would call it a public hospital.

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

Q. Did you have to pay a hospital bill?

A. Yes.

Q. You had to pay the hospital bill yourself?

A. That was through insurance. The Blue Cross paid the hospital bill.

Q. Your employer didn't pay it?

A. No. Nobody paid nothing for me.

Q. (By Mr. Smith): Now, the area where the accident occurred—was it a straight road or a curve? A. No, it was a curve.

Q. And you don't know what the arrangements were between Hasdorf-Nettles and Pomeroy with reference to using their trucks?

A. No, I don't. [17]

Q. Was Pomeroy doing some work up there, themselves? That is, doing actual construction work up there themselves, or had all the work been given to sub-contractors?

A. Oh, no. They were the general contractors.

Q. And they had actual employees up there themselves? A. Oh, certainly.

Q. Did you see any trucks or cars up there that belonged to Hasdorf-Nettles themselves?

A. Just the one truck the Superintendent had.

Q. Was that the only car you saw that they had there?

A. All that I know of that belonged to Hasdorf-Nettles.

Q. Now, how far did you say it was from the

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

point where you say you had the accident and the labor camp?

A. I would say about two miles, if I remember correctly.

Q. And this was on the main road to the labor camp? A. That is right.

Q. (By the Deputy Commissioner): Well, is it in the labor camp or—in the labor camp area or was it in the reservation outside of the labor camp region?

A. It was outside the labor camp region. You see, the area up there for the labor people was just a few blocks square in the center of the base.

Q. (By Mr. Smith): Were the labor organization, the men that were working [18] up there on these jobs—were they allowed free access to all areas of the camp or were they restricted to just certain areas?

A. We were restricted to the labor camp area only. We weren't allowed to go onto the military part.

Q. If you went on the base, you had to stay on the main road and go into your camp; you couldn't go into the military portion whatsoever?

A. No. You could go through on the road, but you weren't allowed in there at night for recreation or anything like that.

Q. Who was your boss up there, in charge of the camp?

A. Jack McIntyre was the Superintendent.

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

Q. Did you ever have any discussion with him with reference to the recreation facilities that were available and what you were to do with your time off?

A. No. As I said, I was there just a short time. I didn't have time for that. I was there just one week actually working and then I was in the hospital and it didn't make any difference.

Q. And in order to get to your camp you had to go over this particular road; that is, from the direction you were coming in?

A. Yes, that is right.

Q. Were you men given any allowance covering transportation [19] from the camp into town?

A. No, sir.

Mr. Smith: I think that is all.

Cross-Examination

By Mr. Keith:

Q. In the morning when you got up, what did you do? Did you go right in to the town of Anchorage? A. When was that, sir?

Q. That morning. A. Yes.

Q. How did you go into town?

A. On the bus.

Q. Who did you go with?

A. A friend of mine, a plumber—Ham Malone.

Q. And you and he planned to go down and catch the train and go up?

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

A. That is where we went from the base, right to the depot.

Q. And you paid your fare on the bus?

A. That is right.

Q. Did you take the Alaskan Railroad to Palmer? A. Yes.

Q. And you say the fair was out of town, there, about a quarter of a mile? A. Yes. [20]

Q. How did you get out there?

A. Walked.

Q. Then you came back into Palmer about what time? A. I guess it was about 5:30.

Q. Where did you meet Mr. Buhlman?

A. There in town.

Q. In town or at the railroad station?

A. No, in town. The railroad station is right across the street, on Main Street.

Q. In town? A. Yes.

Q. What time were you going to get the train?

A. 6:30.

Q. Did you have a round-trip ticket?

A. Yes. I still have got the ticket in my pocket.

Q. And then who was with Mr. Buhlman?

A. Irma Shuler.

Q. And did she work for Pomeroy or Hasdorf-Nettles? A. No.

Q. And where did you meet them? On the street or——

A. Yes, we met them on the street.

Q. What talk did you have with them?

Respondent's Exhibit A—(Continued)
(Testimony of Cecil Vogel.)

A. Just the usual talk—I don't know just what.

Q. Well, what is the usual talk? What was said?

A. Well, "How are you?" and "How did you enjoy the fair?" [21] and so forth. And we talked about things of interest—the big vegetables they grew there, and so forth—the usual talk.

Q. And then did you—how did you happen to go down with them that evening, or plan to go back with them?

A. Well, Rudie just said, "Why not go back with us? I know a good place to eat. We'll have a good dinner and go back on home with me."

Q. So all four of you went, the lady included?

A. That is right.

Q. You went out north of town?

A. I don't know what direction it was.

Q. About ten miles away from town?

A. That I wouldn't know either.

Q. You don't know?

A. Well, I didn't pay any attention to where it was.

Q. Was it quite a little distance?

A. Well, I don't know just how far it was.

Q. Then what did you do at the eating place?

A. Well, we had dinner, and stayed a little bit.

Q. Dance? A. We danced a little bit, yes.

Q. And then you were coming back in the car when the accident occurred? A. Yes. [22]

Q. Were you asleep at the time?

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

A. No, I really wasn't asleep. I remember the accident starting to happen, but after that, I don't remember anything.

Q. Do you know who was driving the car?

A. I couldn't say for sure, no.

Q. (By the Deputy Commissioner): How many of you were in the truck? A. Four of us.

Q. All seated in the front seat? A. Yes.

Q. (By Mr. Keith): All four of you in the front seat? A. Yes, that is right.

Q. Now, this was on the regular road between Palmer and Anchorage?

A. Yes, the regular highway.

Q. The regular highway between Palmer and Anchorage? A. Yes.

Q. This regular highway between Palmer and Anchorage runs through Fort Richardson?

A. Yes.

Q. Do you know how large the Fort Richardson is? A. No, I don't.

Q. It is a large base? A. Yes. [23]

Q. You can go for quite a few miles on the base and not get out of it?

A. I don't know just how big it is because when you work on a government project like that, you just work and don't ask questions.

Mr. Keith: That is all.

The Deputy Commissioner: Does either side have anything further to offer?

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

Mr. Keith: Mr. Buhlman is here. I would like to talk with him.

The Deputy Commissioner: We will recess for five minutes.

(A five-minute recess was taken.)

The Deputy Commissioner: All right. What further?

Mr. Keith: I have a question or two to ask Mr. Vogel.

Further Cross-Examination

By Mr. Keith:

Q. Mr. Vogel, you said you went back and forth to the jobs in army trucks?

A. I think they were, the way I understand it now.

Q. Do you know whether they were army trucks?

A. I think they were trucks rented by Pomeroy Company to haul the men back and forth.

Q. You think they were?

A. That is what I think. I don't know.

Q. But that is the way you got to the job? [24]

A. That is right.

Q. Now, this main highway—you hadn't arrived at the point where you turn off the main highway to go into the camp, had you?

A. You mean where the accident happened?

Q. Yes.

Respondent's Exhibit A—(Continued)

(Testimony of Cecil Vogel.)

A. I tell you I don't know. I am awfully confused on that. I don't know exactly because, as I say, I was up there such a short time. I was all turned around. I didn't know what was what or whenever.

Q. (By the Deputy Commissioner): The trucks you say were army trucks—do you know whether they were driven by Pomeroy employees or by the army?

A. Pomeroy employees. There wasn't any army personnel connect with it whatsoever.

The Deputy Commissioner: Anything else?

(The witness thereupon was excused and retired from the witness stand.)

The Deputy Commissioner: Do you want to offer Mr. Buhlman's testimony?

Mr. Keith: Yes.

Thereupon

RUDOLPH BUHLMAN

was called as a witness for and on behalf of the respondent, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as [25] follows:

Examination

By the Deputy Commissioner:

Q. What is your name?

A. Rudolph Buhlman—B-u-h-l-m-a-n.

Respondent's Exhibit A—(Continued)

(Testimony of Rudolph Buhlman.)

Q. And where do you live?

A. 2408 A Street, Antioch.

Q. Your occupation?

A. Superintendent for Pomeroy Company.

Q. And were you in Alaska on the Pomeroy job in September of this year? A. Yes, sir.

Q. At Fort Richardson? A. Yes, sir.

The Deputy Commissioner: Take the witness, Mr. Keith.

Direct Examination

By Mr. Keith:

Q. Mr. Buhlman, this truck that was in this accident, who was that owned by?

A. Pomeroy Company.

Q. This road that is spoken of on which the accident happened, that is the road between Palmer and Anchorage? A. Yes.

Q. Up to and including the time of the accident, had you arrived at that point on the road where you turn off into [26] the camp?

Mr. Smith: Just for my own interrogation, you mean by "camp," Camp Richardson or the labor camp?

Mr. Keith: I will clarify that.

The Deputy Commissioner: Just a minute.

Q. (By the Deputy Commissioner): Were you in the truck at the time Mr. Vogel was injured?

A. Yes.

Q. You were riding with him in the same truck?

Respondent's Exhibit A—(Continued)
(Testimony of Rudolph Buhlman.)

A. Yes.

Q. And you were in the accident?

A. Yes.

The Deputy Commissioner: All right, go ahead.

Q. (By Mr. Keith): This road between Palmer and Anchorage, does that run through Fort Richardson? A. Yes.

Q. It runs through the Fort, does it?

A. Yes.

Q. Do you know how large that area is?

A. It must be a lot of miles. That camp is big.

Q. Up to and including the time of the accident, had you arrived at the road where you turn off the road to go into the camp? [27]

A. I don't know too much. I was asleep. When I felt the bump, I woke up and the next thing I knew, I was on the ground.

Q. All right. Did you have to turn off the main road to get into the camp? A. Yes.

Q. When the accident occurred, was it on the main road? A. Yes.

Q. And the point where you turn off at, was that beyond that place?

A. Well, I don't know. It was somewheres in the range there.

Q. Somewhere in that range? A. Yes.

Q. But you were still on the main road?

A. Yes.

Q. Do you know about these trucks that are

Respondent's Exhibit A—(Continued)
(Testimony of Rudolph Buhlman.)

used by Pomeroy and Hasdorf-Nettles to take the men back and forth? A. Yes.

Q. They are busses furnished by the army to transport the men from the camp to the job?

A. I don't know whether the government furnishes them or they are rented from the government.

Q. (By the Deputy Commissioner): Who operated them? [28]

A. Pomeroy truck drivers operated them.

Q. Is there any custom of Pomeroy busses picking up the men to go into town or to go other places when they are off duty? A. Not the busses.

Q. Or any of the Pomeroy trucks?

A. Well, you see they have got an office in Anchorage and every night we go down and work and use a pickup to work at the office after working hours.

Q. Who is allowed to use the pick-up?

A. Certain people are assigned to them.

Q. And you give any other workmen a lift if you see them? A. Yes.

Q. (By Mr. Keith): How did it come about this day that Mr. Vogel road back from Palmer with you?

A. Well, we just met him in Palmer where he went to the fair in the town there and just asked him to go with us.

Q. Where were you going at that time?

A. This woman that was there, she knew a place

Respondent's Exhibit A—(Continued)
(Testimony of Rudolph Buhlman.)

above Palmer to eat. I went and ate and had a couple of drinks and danced and came back. I don't know what time it was. It was late.

Q. Had you gone up in the pick-up truck from the labor [29] camp to Palmer that day?

A. Yes.

Q. (By the Deputy Commissioner): Did you ride the train or drive the truck?

A. I drove the truck.

Q. You didn't go up by train?

A. No. I drove up.

Q. How many went up in the truck?

A. Two.

Q. Who were they?

A. Just I and the woman.

Q. You were allowed to use company trucks on holidays, were you, for such trips?

A. I didn't ask them, but they generally let you use them to go around.

Q. That was customary, was it?

A. Not—well, another guy asked to use one. He went up there the same day.

Q. What happened?

A. Oh, he got back, all right.

The Deputy Commissioner: Do you have anything else?

Mr. Keith: Nothing else.

Respondent's Exhibit A—(Continued)
(Testimony of Rudolph Buhlman.)

Cross-Examination

By Mr. Smith:

Q. Mr. Buhlman, it was customary if you were riding [30] into town or riding back from town and saw the workmen on the way, it would be all right for you to pick them up?

A. Oh, we just do it on good will.

Q. Everyone did it; is that correct?

A. Yes.

Q. And this particular car you were driving this day—was that car assigned to you all the time?

A. Yes.

Q. And did you have a car all the time at your disposal? A. Yes; this one.

Q. And you were free to use it to go wherever you wanted? A. I imagine.

Q. There were no limitations placed upon you to the effect you couldn't pick anyone up who happened to be working on the base there with you, was there? A. They never did say so.

Q. And how long had you been working up there on that job?

A. Since July 10th or 11th.

Q. And how long had you been working for Pomeroy before that?

A. Oh, about five years.

Q. (By the Deputy Commissioner): Did the Hasdorf-Nettles Company have any trucks of [31] its own? A. One pick-up.

Respondent's Exhibit A—(Continued)
(Testimony of Rudolph Buhlman.)

Q. And did Pomeroy carry the Hasdorf-Nettles men back and forth to work?

A. That is right; in the buses.

Q. (By Mr. Smith): Now, with reference to where this accident occurred, did it occur in Camp Richardson? A. Yes.

Mr. Keith: By that, you mean Fort Richardson? The Fort Richardson area?

Mr. Smith: Yes.

Q. (By Mr. Smith): And approximately how far would you say it occurred from the labor camp where you boys were staying?

A. Oh, two or three miles, I guess.

Q. Had you gone through a gate where they had checked your card in order to get into the base?

A. I was asleep; but you have to go through that to get in there.

Q. In other words, you had already gone through the place where you are checked through or checked into the base when the accident happened?

A. Yes.

Q. Now, what sort of a car was this? [32]

A. A Ford pick-up.

Q. And you had your cab in the front and some sort of a box in the back? A. Yes.

Q. And there were four of you in the car at the time? A. Yes.

Q. And how long had you had this particular car—ever since you had been up there in July?

A. Oh, about two months.

Respondent's Exhibit A—(Continued)

(Testimony of Rudolph Buhlman.)

Q. And did you keep this car alongside of your living quarters or did you have to park it in the garage up there with the rest of the trucks?

A. It was used upon the job and in the camp you parked it. They had a certain place along the road where they parked the buses and cars and pick-ups.

Q. And you parked your truck up there where the other cars were parked and when you wanted it you got it? A. Yes.

Q. You kept the car key to the car yourself?

A. Yes.

Q. And you didn't have to check it in or out?

A. No.

Q. And when you wanted gas, you went to the company gas tank and they would give you what gas you needed? A. Yes. [33]

Q. (By the Deputy Commissioner): You didn't have to buy your gas for that truck? A. No.

Q. (By Mr. Smith): When they gave you the car, were there any limitations placed on your driving as to where you could go or who could ride with you or who could drive the car? A. No.

Mr. Smith: That is all.

Further Direct Examination

By Mr. Keith:

Q. Did they instruct you that you should pick up these men and take them into town?

A. No.

Respondent's Exhibit A—(Continued)

(Testimony of Rudolph Buhlman.)

Q. You just did it as a matter of good will on your part? A. Yes.

Q. Did you ask them if you could use it on going on recreation? Could you have gone to Fairbanks with the car—something like that?

A. I understand some others went up during the week ends, up to McKinley, but I never did ask them to go any place with it.

Q. You didn't ask on this occasion?

A. No. [34]

Q. (By the Deputy Commissioner): Did the others you mention go in company cars?

A. One of them did.

Q. (By Mr. Keith): But, as I understand, he asked permission? A. Yes.

Q. Who would know what arrangement was made by the army about these trucks? Do you know whether Hasdorf-Nettles paid for part of it?

A. No, I don't think so. I think it is a part of the general contract. He has to supply all that.

Q. You think that was in the contract between Hasdorf-Nettles and the Pomeroy Company?

A. Oh, I couldn't say, but all the other contractors did the same. They had buses, too, and they haul all the men.

Q. Who would know about that?

A. It would be the Project Manager up in Alaska.

Q. He is down here now?

A. No, he is still up there.

Respondent's Exhibit A—(Continued)

(Testimony of Rudolph Buhlman.)

Q. Do you know his name?

A. C. F. Urbutt.

(Discussion off the record.)

Further Cross-Examination

By Mr. Smith:

Q. You state you had never received any instructions [35] that you were to pick up workers in the camp; however, it was customary up there, if you saw a worker walking along, to pick him up?

Mr. Keith: The "customary" part is objected to unless you show the employer knew about it.

The Deputy Commissioner: Overruled.

Did you get the question?

A. There wasn't nobody ever walked. When we come out from eating, the men would be there and we would pick them up and they would go with us.

Q. In other words, if you saw some one standing there, you would stop and say, "Come along."

A. Yes.

Q. And you would see other drivers in Pomeroy doing the same thing, wouldn't you? A. Yes.

Q. Who was the boss over you?

A. This Urbutt.

Q. Did Urbutt eat in the mess hall with you fellows? A. He stayed in town.

Q. Do you know if he ever saw you pick fellows up?

Respondent's Exhibit A—(Continued)

(Testimony of Rudolph Buhlman.)

A. No, he was never around. He just came out once a week.

Mr. Smith: All right. That is all.

The Deputy Commissioner: The case [36] submitted?

Mr. Smith: Yes, except I was to submit medical reports.

(Thereupon the witness was excused and retired from the witness stand.)

The Deputy Commissioner: Submitted.

(Thereupon, the instant hearing was concluded.) [37]

[Endorsed]: Filed December 29, 1950.

[Title of District Court and Cause.]

Monday, April 9, 1951

Met, pursuant to notice, at 9:30 a.m.

Before: Warren H. Pillsbury,
Deputy Commissioner of the Thirteenth Compensation District.

Appearances:

For the Claimant:
JOSEPH E. SMITH,
SMITH & PARRISH.

Respondent's Exhibit A—(Continued)

For the Defendant (United Pacific Insurance Company):

THEODORE P. NIEDERMULLER,
KEITH, CREEDE & SEDGWICK.

PROCEEDINGS

The Deputy Commissioner: This is a continued hearing.

Claimant is present in person.

He is represented by Joseph E. Smith, attorney-at-law, and the defendant is represented by Keith, Creede & Sedgwick, Theodore P. Niedermuller appearing.

In this case, hearing was held on December 18, 1950, and decision was postponed on the theory that he was negotiating for a third party settlement.

I now have a settlement completed with releases signed and while the money was not paid, the record may be made up at this time to show that the matter can be reopened on questions of any change that should be made in the present situation.

It is anticipated that this settlement will be completed within the time allowed for filing points of authority by the parties and it will therefore be understood that this record that has been submitted for decision will so stand unless I receive a request for further proceeding.

Claimant has filed a third-party suit against J. F. Pomeroy & Company who were the contractors

Respondent's Exhibit A—(Continued)

on the work in Alaska where claimant was injured while in the employ of the defendant Hastorf-Nettles which was a subcontractor under Pomeroy & Company. That agreement has been entered [3*] into between claimant and the United Pacific Insurance Company which was also the insurance carrier for Pomeroy in the third party suit for settlement of claimant's suit for damages for the gross sum of $5,000. That release had been signed and payment will be made within the next few days unless I am notified of some change. If I am not notified, it will be assumed that payment has been made.

Is that agreed to, gentlemen?

Mr. Niedermuller: Yes.

Mr. Smith: Yes.

The Deputy Commissioner: So stipulated by the parties.

Now, I assume that there will be—that it may be taken that the settlement was made with the consent of defendants herein?

Mr. Niedermuller: Yes.

The Deputy Commissioner: Defendants request an entry of a compensation order determining the issues of compensation at the hearing of December 18 in this proceeding which will be done.

I call the attention of the parties to a recent decision of Mr. O'Leary, Valak vs. Brown, Pacific-Maxon which in my opinion has a bearing in this case.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Respondent's Exhibit A—(Continued)

There has recently been some discussion as to whether, where such recovery or settlement is made there should [4] then be some apportionment of attorney's fees to represent the benefit received by the defendants herein.

I will ask for a memoranda of authorities from counsel on that question.

Mr. Smith may have fifteen days and Mr. Niedermuller fifteen days and Mr. Smith five days to reply.

The matter stands submitted as above noted.

Defendants have furnished me since the last hearing with additional medical reports.

The report of Dr. Mensor and Dr. Shumate of February 16, 1951, will be received in evidence as Exhibit "A" of this case.

(Thereupon the document in question was received in evidence and was marked Exhibit "A" and is filed in the office of the Deputy Commissioner with the other paper in this case.)

Respondent's Exhibit A—(Continued)

(Copy)

EXHIBIT "A"

Page 4—Letterhead of

Merrill Coleman Mensor, M.D.
James W. Shumate, M.D.
San Francisco 2
Orthopedic Surgery

February 16, 1951.

Keith, Creede & Sedgwick,
220 Bush Street,
San Francisco, California.

Re: Cecil Vogel Age: 35. Add: 2955 Morgan Avenue, Oakland, California. Emp: Hastorf-Nettles, Inc. Occ: Steamfitter. Inj: September 4, 1950.

Opinion:

From the history obtained of this patient's accident, he probably sustained a transient dislocation of the upper cervical spine and although there is no demonstrable bony injury, by X-ray, the persistent rotation of the first cervical leads us to believe that the dislocation may have occurred at that area, the capsular lesion now being healed.

We feel it would be advisable for him to rather rapidly remove the cervical collar and the persistent symptoms be treated symptomatically as active motion of the neck is increased. Relative to the left shoulder, we believe the complaint of pain described over the point of the scapula is the result of the fracture sustained into the glenoid which

Respondent's Exhibit A—(Continued)

is causing rotation of the scapular body allowing the point of the scapula to rub unduly against the rib cage.

It is felt that this area should be treated therapeutically both as a test and maybe treatment by novocaine therapy. If the condition is temporarily relieved, but not permanently relieved by the novocaine then the matter of resecting the point of the scapula to avoid impingement on the rib cage should be seriously considered.

It is not unlikely that he is developing an adventitious bursa in this area.

He has likewise a persistent chronic sprain of his left acromioclavicular joint which would respond to the same type of novocaine therapy.

There is no disability in the shoulder joint or in the extremity itself other than described. His coccygeal pain is due to hemorrhoids and not related to his injury.

At present, we consider the patient temporarily totally disabled but the suggested therapy should restore him to work-bearing status within two or three months. There will probably be some permanent disability in the form of limitation of cervical spine motion and a variable amount of pain on heavy use.

Very truly yours,

/s/ MERRILL C. MENSOR,

DRS. MENSOR AND SHUMATE.

Respondent's Exhibit A—(Continued)

Q. (By the Deputy Commissioner): Mr. Vogel, have you returned to work yet? A. No.

Q. Are you able to return to work at this time?

A. No, not according to my doctor.

Q. Are you wearing a Thomas collar or the equivalent, holding your head?

A. Which my doctor hasn't released me to take off yet. [5]

Q. Who is your doctor?

A. K. A. Neilson.

The Deputy Commissioner: Has either side anything to offer?

Mr. Smith: I don't know whether you want an itemization of all the bills.

The Deputy Commissioner: Give it to Keith, Creede & Sedgwick.

My practice is to pass on the facts of liability and if liability for past medical expenses are established, the parties are invited to negotiate between themselves. If they are unable to agree, you should notify me and I will see when I can set the matter for further hearing to fix the amount to be paid.

Are you able, Mr. Smith, to tell me what the attorney's fees and court costs are?

Mr. Smith: Fifteen hundred dollars.

The Deputy Commissioner: Anything else?

Mr. Smith: No.

Mr. Niedermuller: No.

That will be all, Mr. Vogel.

(Thereupon the claimant retired from the hearing room.)

[Endorsed]: Filed May 5, 1951.

Respondent's Exhibit A—(Continued)

Form US-203

Form Approved.
Budget Bureau No. 79-R013.1.

Leave This Space Blank
Case No. .....
Insurance
Carrier's No. .....

Federal Security Agency
Bureau of Employees' Compensation

Office of Deputy Commission,
Warren H. Pillsbury
Administering Longshoremen's and Harbor
Workers' Compensation Act

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

Injured Person

1. Name of employee: Cecil Vogel. Employee's check No.....

2. Address: Street and No.: 2955 Morgan Ave. City or town: Oakland, Calif.

3. Sex: Male. Age: 33. Married, single, widowed: Married.

4. Do you speak English? Yes. Nationality: U.S.A.

Respondent's Exhibit A—(Continued)

5. State regular occupation: Steamfitter.

6. What were you doing when injured? Steamfitting.

7. (a) Wages or average earnings per day? $37. (Include overtime, board, rent and other allowances.) (b) Per week? $221. (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when: .....

8. Were you paid full wages for day of accident? No.

Employer

9. Employer: Hastorf-Nettles, Inc.

10. Office address: Street and No.: 140 Hawthorne. City or town: San Francisco.

11. Nature of business: General contracting.

The Injury

12. Place where injury occurred: Fort Richardson, Alaska, on road from Palmer to Anchorage.

13. Name of foreman: Mr. Jack McIntyre (Supt.)

14. Date of accident or first illness: The 4th day of Sept., 1950, at 10:30 o'clock p.m.

15. How did accident happen or how was occupational disease caused? I was a passenger in a truck owned & operated by J. H. Pomeroy & Co.,

Respondent's Exhibit A—(Continued)

contractors with whom my employer had a subcontract. Truck overturned, injuring me.

Nature and Extent of Injury

16. State fully nature of injury or occupational disease: Fractures of cervical vertebrae, odontoid process, left scapula, left humerus, left ulna; cuts, contusions & lacerations of head, neck, shoulder & arm.

17. On what date did you stop work because of injury? September 4, 1950.

18. Have you returned to work? (Yes or No) No. If "yes," on what date? ....., 194....

19. Does injury keep you from work? (Yes or No) Yes.

20. Have you done any work in period of disability? No.

21. Have you received any wages since injury? No. If so, from and to what date? .....

22. Has injury resulted in amputation? No. If so, describe same.....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? No.

24. Attending physician: Name: A. S. Walkowski, MD. Address: Anchorage, Alaska. Also K. A. Nielson, MD., of Oakland.

25. Hospital: Name: Providence Hosp. Address: Anchorage, Alaska.

Respondent's Exhibit A—(Continued)

Notice

26. Have you given your employer notice of injury? (Yes or No) Yes. When? Sept. 5, 1950.

27. If such notice was given, to whom? Supt. Jack McIntyre.

28. Was it given orally or in writing? Orally.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by willful intention, and in support of it I make the foregoing statement of facts.

Signed by: CECIL VOGEL,
Claimant.

Dated November 4, 1950.

Mail address: 2955 Morgan Av., Oakland, Calif.

el.

Respondent's Exhibit A—(Continued)

Form US-215

Leave This Space Blank
Case No. D3-2134
Insurance
Carrier's No. .....

Federal Security Agency—Bureau of Employees' Compensation

Office of Deputy Commissioner.....
Administering Longshoremen's and Harbor Workers' Compensation Act

Answer of Employer or Insurance Carrier to Employees' Claim for Compensation

CECIL VOGEL,

Claimant,

vs.

HASTORF-NETTLES, INC.,

Employer,

UNITED PACIFIC INS. CO.,

Insurance Carrier.

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is [denied] that applicant sustained an injury on or about the date set forth in the application.

2. It is [denied] that both the employer and employee were subject to the Longshoremen's and

Respondent's Exhibit A—(Continued)

Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is [denied] that the relationship of employer and employee existed at the time of the injury.

4. It is [denied] that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is [admitted] that notice of injury was given employer as specified in application.

6. It is [denied] that applicant was permanently disabled to the extent stated in application.

7. It is [denied] that applicant was temporarily disabled for the period stated in application.

8. It is [admitted] that the rate of wages as set forth in application is correct.

UNITED PACIFIC
INSURANCE COMPANY,

KEITH, CREEDE &
SEDGWICK,

By /s/ G. KEITH,
Its Attorneys.

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

Respondent's Exhibit A—(Continued)
U. S. Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District

[Title of Cause.]

CERTIFICATION OF RECORD

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the U. S. Department of Labor, Bureau of Employees' Compensation under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Compensation Acts (Acts of Congress of August 16, 1941, and December 2, 1942) for the Thirteenth Compensation District, comprising the State of California and other portions of the United States;

That there has recently been pending before me as said Deputy Commissioner, a claim for compensation transferred to me under said Acts from the 14th Compensation District of Cecil Vogel against Hastorf-Nettles, Inc., employers, and United Pacific Insurance Company, insurance carrier, my file No. DB-14-1125-2.

That the attached are originals or true and correct copies of pleadings, transcript of testimony, and exhibits in said file, as listed below, being a copy of the entire file therein so far as relevant to a review of the above proceedings:

1. Claim for Compensation, US 203—copy.
2. Answer US 215.

Respondent's Exhibit A—(Continued)

3. Transcript of Testimony of December 18, 1950 (no exhibits).

4. Transcript of Testimony of April 9, 1951, with attached Exhibit "A"—Medical Report of Dr. Merrill Coleman Mensor dated February 16, 1951.

5. Compensation Order, Award of Compensation, dated August 17, 1951.

Given under my hand at San Francisco, California, this 25th day of September, 1951.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

cj:sy

[Endorsed]: Filed January 11, 1952.

[Title of District Court and Cause]

ORDER

The defendants' Motion to Dismiss has been argued, briefed and submitted for a ruling. The Court, having made an independent examination of the record, concludes that the Findings and Award of the Deputy Commissioner are supported by substantial evidence considering the record as a whole, O'Leary vs. Brown-Pacific-Maxon, Inc., 340

U. S. 504. Therefore the Motion to Dismiss must be granted.

It Is So Ordered.

/s/ OLIVER J. CARTER,
United States District Judge.

Dated January 29, 1952.

[Endorsed]: Filed January 29, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 30853

HASTORF-NETTLES, INC., a Corporation, and UNITED PACIFIC INSURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District Under the Longshoreman's and Harbor Workers' Compensation Act and the Defense Bases Act, and CECIL VOGEL,

Defendants.

JUDGMENT OF DISMISSAL

Defendant's motion to dismiss having heretofore been granted by an order entered January 29, 1952,

It Is Hereby Ordered, Adjudged and Decreed

That the above-entitled action be and it is hereby dismissed.

Dated January 30th, 1952.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed January 30, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Hastorf-Nettles, Inc., and United Pacific Insurance Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting defendants' Motion to Dismiss entered in this action on January 29, 1952.

KEITH, CREEDE &
SEDGWICK,

/s/ FRANK J. CREEDE,

/s/ SCOTT CONLEY,

Attorneys for Appellants, Hastorf-Nettles, Inc., and United Pacific Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, and that they constitute the record on appeal as designated by the Attorneys for the Appellants:

Complaint to review compensation order and for injunction.

Motion to dismiss.

Order granting motion to dismiss.

Judgment of dismissal.

Notice of appeal.

Appellants' designation of record on appeal.

Respondents' Exhibit "A" (transcript of proceedings before Warren H. Pillsbury, Deputy Commissioner).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 7th day of March, 1952.

C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL NOTICE OF APPEAL

Notice Is Hereby Given that Hastorf-Nettles, Inc., and United Pacific Insurance Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting defendants' Motion to Dismiss entered in this action on January 29, 1952, and from the Judgment of Dismissal entered on January 30, 1952.

KEITH, CREEDE &
SEDGWICK,

By /s/ SCOTT CONLEY,

/s/ FRANK J. CREEDE,

Attorneys for Appellants, Hastorf-Nettles, Inc., and United Pacific Insurance Company.

[Endorsed]: Filed March 14, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in the above-entitled case and that they constitute a supplement to the record on appeal herein:

stantial evidence on the record considered as a whole.

Appellants designate as the record which is material to the consideration of the appeal the following:

(1) Complaint in the District Court.

(2) Motion to Dismiss of Defendant Warren H. Pillsbury.

(3) Exhibit "A" on Motion to Dismiss of said defendant being transcript of record of Deputy Commissioner Warren H. Pillsbury.

(4) Order of District Court granting defendants' Motion to Dismiss.

(5) Judgment.

(6) Notice of Appeal.

(7) Statement of Points.

(8) Clerk's certificate.

Dated: This 29th day of February, 1952.

KEITH, CREEDE & SEDGWICK,

By /s/ SCOTT CONLEY,

Attorneys for Appellants Hastorf-Nettles, Inc., and United Pacific Insurance Company.

[Endorsed]: Filed March 5, 1952.

No. 13,286

IN THE

United States Court of Appeals

For the Ninth Circuit

HASTORF-NETTLES, INC., a corporation, and UNITED PACIFIC INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,

Appellees.

BRIEF FOR APPELLANTS.

KEITH, CREEDE & SEDGWICK,
FRANK J. CREEDE,
SCOTT CONLEY,
220 Bush Street, San Francisco 4, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,286

IN THE

United States Court of Appeals

For the Ninth Circuit

HASTORF-NETTLES, INC., a corporation, and UNITED PACIFIC INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

By complaint for injunction (Tr. 3),* filed August 29, 1951 in the District Court below, appellants sought to have that court review and set aside as not in accordance with law a compensation order in favor of Cecil Vogel made by Deputy Commissioner War-

*"Tr." refers to Transcript of Record; references are to pages.

ren H. Pillsbury on August 17, 1951. Said complaint was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. Sec. 901 et seq., as made applicable to employment at certain defense base areas and elsewhere by the Act of August 16, 1941, 55 Stat. 622, 42 U.S.C.A. Secs. 1651-1654. Jurisdiction in the District Court was based particularly on Section 921(b) of the said Longshoremen's Act.

Thereafter defendant Pillsbury filed a motion to dismiss and the cause was argued before the District Court.

On January 29, 1952 the District Court filed its order granting the said motion to dismiss, and on January 30, 1952 said court entered judgment of dismissal thereon.

On February 20, 1952 appellant filed its notice of appeal from said order and on March 14, 1952 filed a supplemental notice of appeal from the judgment of dismissal.

The jurisdiction of this court is invoked under 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE.

Cecil Vogel was employed as a steamfitter at Fort Richardson, Alaska, by the Hastorf-Nettles Company, which was a subcontractor for the Pomeroy Company; other than this subcontract, the companies were not connected (Tr. 23). While there, Vogel lived

in a labor camp located five or six miles from Anchorage (Tr. 21). Fort Richardson is a large Army base and the work being performed by the Hastorf-Nettles Company was about seven miles from the labor camp, which was also on the base.

September 4, 1950 was Labor Day and a holiday from work (Tr. 26). Upon the morning of that day, claimant Vogel and a fellow employee went to Anchorage on the regular city bus to a station of the Alaskan Railroad. It was their intention to take the train to Palmer, a small community some forty-five miles from Anchorage (Tr. 21) and to attend an exposition there. The claimant purchased a round-trip ticket at the station in Anchorage. The pair then took the train to Palmer and walked from the railroad station there to the fair grounds, which were about one quarter of a mile from town.

At about 5:30 P. M. they returned to Palmer, intending to catch the 6:30 P. M. train back to Anchorage, when they met Mr. Buhlman, who was a carpenter superintendent for the Pomeroy Company, and a personal friend of the claimant (Tr. 21, 33, 34). Buhlman had arrived at the Fair in a pick-up truck belonging to the Pomeroy Company. His trip was likewise for purposes of recreation (Tr. 41). Buhlman suggested that the two men and a lady who was in Buhlman's company should have dinner at a restaurant outside of Palmer, and that he would then give them all a ride back to the base. All four then proceeded to the restaurant, had dinner, stayed a little bit and danced (Tr. 34). They then drove down the

regular public highway between Palmer and Anchorage until in some maner the truck was driven off the road a few miles from the labor camp (Tr. 35). In this accident, the claimant received his injuries.

Claimant's employer, the Hastorf-Nettles Company, had only one pick-up truck of its own at Fort Richardson (Tr. 30) and employees of this company were usually transported between the labor camp and the place of work in Pomeroy trucks (Tr. 23, 24, 39, 40, 45). The claimant never had occasion to use Pomeroy vehicles other than in traveling back and forth between his camp and the job site (Tr. 24).

Witness Buhlman testified that he had been assigned a Ford pick-up truck by the Pomeroy Company (Tr. 42, 43). He kept this truck in his personal custody at all times, and the Pomeroy Company supplied the gasoline. Buhlman and other Pomeroy drivers sometimes gave lifts to employees of subcontractors who were returning from the mess hall to the labor camp (Tr. 46). The Pomeroy Company had an office in Anchorage, and if Buhlman happened to be driving there after working hours, and he saw a workman, he would give such a person a ride as a matter of goodwill (Tr. 42, 45). He received no direct instructions to do this (Tr. 44).

On September 4, 1950, Buhlman did not ask specific permission to take the truck to the Fair.

There were no recreational facilities at the labor camp (Tr. 25); the men who were off duty could go into Anchorage (The 1950 population of Anchorage is

estimated at 20,000). The Hastorf-Nettles Company did not supply transportation into town, nor did it give the men an allowance covering such transportation (Tr. 27, 32). There was a city bus running between the camp and Anchorage as well as a taxi service. The buses ran every half hour or hour, and claimant usually went by bus when he had occasion to go to Anchorage (Tr. 28, 29).

QUESTION PRESENTED.

The sole question presented for the determination of the court is whether or not there is substantial evidence in the record considered as a whole to justify the finding that claimant's injury arose out and in the course of his employment.

SPECIFICATION OF ERROR.

Appellant specifies as error the findings of fact of Deputy Commissioner Pillsbury (Tr. 11-13) and particularly the following:

> "1. * * * Claimant's injury arose out of and in the course of his employment with the employer herein * * *" (Tr. 12).

Appellant specifies this finding as error because it is not supported by a substantial evidence on the record considered as a whole. *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

SUMMARY OF ARGUMENT.

A. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, provides for compensation for injuries; but an award may be made only for such injuries as arise out of and in the course of the employment, 33 U.S.C. Sec. 902(2).

B. Claimant on the occasion of his injury had been enjoying a day off from work, and had gone to a distant town for purely recreational purposes. At the time he was injured, he was returning to his camp in a truck belonging to another employer than the appellant and was performing no service in connection with his employment. Under general principles of compensation law, and particularly under the "going and coming rule", it would appear that his injury did not arise out of and in the course of his employment.

C. An exception to the "going and coming rule" is recognized where the employer furnishes the transportation, in the course of which the employee is injured. An examination of the cases indicates that before the employer can be said to have "furnished the transportation" it must appear:

1. That the employer owned or controlled the means of transportation *and*
2. That the transportation furnished was contemplated by the contract of employment.

D. In the instant case, there is no evidence at all—

1. That the claimant's employer, the appellant herein, owned or controlled the transportation at the time claimant received his injuries *and*

There is no *substantial* evidence in the record considered as whole to indicate—

2. That the transportation was contemplated by the contract of employment.

Under the ruling of the Supreme Court of the United States in the recent case of *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, Appellate Courts are required to examine the record to determine whether or not there is substantial evidence to support the findings. An examination of this record clearly indicates that claimant has not established that the injury in this case arose out of and in the course of employment.

ARGUMENT.

1. EXCEPT WHERE THE EMPLOYER FURNISHES THE TRANSPORTATION, INJURIES INCURRED WHILE THE CLAIMANT IS GOING TO OR COMING FROM WORK DO NOT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The Longshoremen's and Harbor Workers' Compensation Act is similar to many other compensation statutes in that compensation is provided thereunder only in the case of injuries which arise out of and in the course of employment. 33 U.S.C. Sec. 902(2).

> "The term 'injury' means accidental injury or death arising out of and in the course of employment * * *"

It is a familiar rule under most compensation acts that an employee who is injured while going to or coming from work may not recover compensation, since his injury does not arise out of and in the course of his employment. In this case it is undisputed that the claimant's purpose when he accepted a ride in Palmer from Buhlman, the Pomeroy Company superintendent, was to return to the labor camp on the Fort Richardson army base after a day of personal recreation. Therefore, if his injury is compensable, it is because he qualified for compensation under some exception to the going and coming rule.

> "One well recognized exception to the general rule is that when transportation is furnished by the employer to convey a workman to and from his place of work as an incident of the employment and the means of transportation are under the control of the employer, an injury sustained during such transportation arises in the course of employment and is compensable." *Smith v. Industrial Accident Commission,* 18 Cal. (2d) 843, 118 Pac. (2d) 6.

This exception is amplified in 27 *Cal. Jur., Workmen's Compensation,* Sec. 85:

> "Thus when transportation is not furnished as a necessary incident of the employment or as a requirement imposed by the nature or the location of the work, and the use of transportation on the part of the employee is entirely voluntary

and optional and bears no relation to the contract of employment, the dangers involved are not risks of the employment and therefore an injury incurred while using such means of transportation is not compensable."

---

2. BEFORE THE EXCEPTION TO THE GOING AND COMING RULE IS APPLICABLE BOTH THE FACTORS OF CONTROL AND CONTEMPLATION BY THE CONTRACT OF EMPLOYMENT MUST APPEAR.

An examination of the principal cases discussing the exception to the going and coming rule reveals that although they fall into different factual categories, there is no case where compensability of an injury has been sustained where there have not been present *both* the factors that the employer owned or controlled the means of transportation *and* that the transportation so furnished was contemplated by the contract of employment. A few of the principal cases will be summarized here to demonstrate this fact.

A. The commonest situation where the exception to the rule is invoked is where the employer arranges with the employee that he will be driven to and from work. Such an arrangement is often used where the employee's home is distant or inaccessible from the place of work and the employer wishes to make certain that his labor force will reach the job each day without undue delay.

Characteristic of this type of case is *Rubeo v. Arthur McMullen Company,* 117 N.J.L. 574, 189 Atl.

652; *Id.,* 118 N.J.L. 530, 193 Atl. 797. There, the employee received a daily ride with the employer's superintendent from his home in New Jersey to the job in Staten Island. The vehicle involved in the accident wherein the employee was injured was one of the employer's trucks, and the accident occurred on the homeward trip. It was held that under these circumstances the travel arrangement was one of mutual benefit and convenience and was in effect a part of the employment contract, and that the injury was hence compensable.

Likewise in *McWilliams Dredging Company v. Henderson,* 36 Fed. Supp. 361, the employee was drowned while returning on a Sunday night on a scow belonging to his employer to the dredge where he bunked. It was shown that this was the regular method of getting to and from the dredge and that the employer furnished this means of transportation to his employees.

In each of these cases, it is apparent from the facts that the employer owned or controlled the transportation and that the transportation furnished was contemplated by the employment in that it was of benefit both to the employer and to the employee.

B. Another common situation is where the employer does not actually own the transportation but either pays the employee a transportation allowance or makes some other arrangement for his carriage. In *Trussless-Roof Company v. I. A. C.,* 119 Cal. App. 91, 6 Pac. (2d) 254, the employee was receiving a ride

in a fellow employee's car when the injury occurred. It appeared that the employer had agreed to reimburse the employee who furnished such transportation. Under these circumstances, the result was the same as if the employer had furnished the car, and the Court held that he could not be heard to deny the element of control of the transportation.

Similar is the case of *Alberta Contracting Corporation v. Santomassino,* 107 N.J.L. 7, 150 Atl. 830, where the employees worked at a remote area not readily accessible by public transportation. It was their custom to ride to and from work in trucks being used on the job. The employer had long known and acquiesced in the employees' habit of using these trucks for transportation to and from work, though he had not given specific permission. It was held that under these circumstances the transportation was in effect being furnished by the employer, and the case was held compensable.

Likewise in *Cardillo v. Liberty Mutual,* 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028, the employer was required to furnish transportation to its employees because of a contract between it and the union to which the particular claimant belonged. The employer chose to take care of this requirement by paying the transportation cost and allowing employees to drive their own vehicles. It was held that it could not abdicate the function of control by such means, but must be held to have continued in control, so that an injury incurred by the claimant while travelling home after work in his own automobile was compensable.

The case of *Liberty Mutual Insurance Company v. Gray,* 137 Fed. (2d) 926, likewise illustrates the holding in this type of situation. There the facts were that a construction worker was hired to work a seven day week on Oahu, T. H. He lived in a construction camp, ordinarily receiving free transportation from his employer from the camp to his place of work. On the occasion in question he took two days off and went into Honolulu for recreation, and on the morning of the third day boarded a bus to return to work. He was injured in an accident while on the return trip. It appeared that the bus was the property of an independent contractor, but had been hired by his employer exactly for the purpose for which he was using it, i.e. to return the employees from the city to the place of work. No fare was charged the employee. Under these circumstances, the Court was able to find that the employer contemplated such recreation by the employees and furnished them transportation from town to the place of work.

It should be noted particularly that the element of control of the transportation is still present in this case, as much as if the employer had itself owned the bus in which the claimant incurred his injuries. Likewise, the employer recognized the need for recreation by its employees and furnished transportation for the very purpose for which it was being used—the returning of employees from the city to the place of work.

C. Where the employee is injured in the employer's transportation, but such transportation is fur-

nished only as a courtesy and has no relation to the contract of employment, the cases are uniform in holding such injuries non-compensable.

This was the situation in *Boggess v. I. A. C.,* 176 Cal. 534, 169 Pac. 95. There the applicant, a miner, was on leave of absence and had returned part way to his place of employment when he met his superintendent, who offered to pay him for his time in helping load a truck with supplies for the mine. When the loading was completed, the superintendent offered to take the employee back to the mine instead of his taking the stage as he had planned. On the way the accident occurred. The Court held the injury not compensable stating:

> "his going to the mine on the truck instead of by stage was arranged merely as a matter of convenience to him. It was no part of his service."

To the same effect, see *Gruber v. Mercy,* 7 N.J. Misc. 241, 145 Atl. 106.

A similar decision was reached in the case of *Hama Hama Logging Company v. Department of Labor,* 288 Pac. 655, 157 Wash. 96. There the employee was injured while making a free Sunday trip from the logging camp to a nearby town for personal reasons on the employer's railroad speeder. The evidence further showed that the employer took employees to town regularly for recreation on weekends. The court in holding the case non-compensable stated:

> "Spears was not engaged in furthering the interests of his employer at the time he received his injuries. Those injuries were sustained on an

> occasion when time was his own. He was making the trip from the camp on his own time and for his own personal business or pleasure. * * * The Logging Company merely permitted or authorized its employees to ride on the speeder free of charge as a convenience to the employees and not in furtherance of its business. This is not a case wherein the employer has agreed to transport its employees to and from work daily as a part of its contract with them. Here the employee sustained an injury when he was not performing any duty that he owed to his employer."

A recent California case, *Arabian American Oil Company v. I. A. C.,* 94 Cal. App. (2d) 388, 210 Pac. (2d) 732, holds that a trip for pleasure is not made a business trip because the employee uses the employer's vehicle with permission. There the injured person was employed as a stenographer in Saudi Arabia by Aramco. While there she lived in a company town and was given board, lodging and transportation to and from work. The employer also maintained a car pool so that its employees might use its vehicles for pleasure after work. The employee in this case was injured outside of the company town while being driven by a fellow employee in one of the car pool vehicles to a beach for recreation. Under these circumstances the Court held the injury not compensable, stating:

> "Petitioner contends that the injury did not arise out of or in the course of employment and that the injury was not proximately caused by the employment. That contention is sustained * * * Miss Brown * * * at the time of the accident was

> on a pleasure trip. While petitioner permitted employees after working hours to use his vehicles for pleasure it did not require them to do so. * * * The mere fact that she was riding in a vehicle owned by petitioner at the time of the accident is not sufficient to create liability under the Workmen's Compensation Act."

D. Likewise, where the element of ownership or control of the vehicle is absent, it has been held that an injury received therein is not compensable.

In *California Highway Commission v. I. A. C.,* 61 Cal. App. 284, 214 Pac. 658, the injured man worked on highway construction and lived at a camp furnished by the State. It was the custom for the workmen to return to camp from their particular location on the highway for lunch each day on trucks furnished by the employer Highway Commission. On the day of injury the applicant missed the truck bound for camp and started to walk back, but after walking a little bit, he was picked up by a fellow employee who was driving his personal vehicle. The accident occurred on the way to camp. In holding the situation not one of compensability, the court stated:

> "The logic and reason of charging an employer in a case where an employee is injured while riding on an instrumentality provided by said employer is that said employer has such instrumentality under his control. He may inspect and repair it. He must see that it is driven by a competent and careful driver. It is his business to look after such conveyance just as it is his business to look after the safety of the premises where

his employees work; but when the employer does not own or control the vehicle; does not even know that the employee will elect to use it; does not know whether it shall be driven by a reckless or careful driver or by a man who is intoxicated or by one who is sober, how can it be either logical or just to hold him responsible for injuries occurring to the employee while riding to and from his work in such a vehicle? Had applicant entered a conveyance provided by his employer to take employees to lunch, the risk attendant upon riding therein might be a risk incident to his status as an employee because only in that capacity would he enter the vehicle. But when he chose to accept an offer from a driver of a passing vehicle to take him to lunch, a matter of personal concern to himself—all possible connection with his employment was severed."

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3. **IN REVIEWING THE FINDINGS OF THE DEPUTY COMMISSIONER THIS COURT MUST DETERMINE WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO JUSTIFY THOSE FINDINGS.**

In *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, the Supreme Court decided that the judicial review provisions of the Administrative Procedure and Taft-Hartley Acts were identical in that the legislative history of both Acts indicated that these statutes had broadened the scope of judicial review. In reviewing administrative proceedings, the Supreme Court indicates that the Appellate Courts are not merely to search the record for *some* evidence to support a particular finding but—

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight * * * Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

It cannot be doubted that this new standard of judicial review is applicable to proceedings under the Longshoremen's and Harbor Workers' Act. *O'Leary v. Brown-Pacific-Maxon,* 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483.

The new standard established by the *Camera* case has received comment in some of the other circuits. For example, in *National Labor Relations Board v. Universal Camera, etc.* (2nd Cir.), 190 Fed. (2d) 429, on hearing after remand by the Supreme Court, Judge Learned Hand commented:

> "* * * (A)lthough the amendment of the old Act was in terms limited to adding that courts of appeal should scrutinize the whole record on reviewing findings of the Board, its implications were more extended * * * the (Supreme) Court agreed that in the case at bar we had based our review upon the whole record, but it held that the amendment had been a resultant of prolonged discussion in both houses, and although in form it did not more than incorporate what had always been the better practice—our own included—it was intended to prescribe an attitude in the courts of appeal less complaisant toward the Board's findings than had been proper before; not only were they to look to the record as a whole, but they were to be less ready to yield their personal judgment on the facts; at least less ready than many at times had been.

> Presumably that does not extend to those issues on which the Board's specialized experience equips it with major premises inaccessible to the judges, but as to matters of common knowledge we ought to use a somewhat stiffer standard * * *"

In *N.L.R.B. v. Tri-State Casualty Insurance Company,* 188 Fed. 2nd 50, the Tenth Circuit commented:

> "* * * Since the amendatory act did not purport to curtail the power of the Board to prevent prescribed unfair labor practices and since 'no drastic reversal of attitude was intended' by the change in terminology in Section 10-E, we perceive that the net effect of the Universal Camera Corporation case is to quicken the disposition of the Appellate Courts to vouchsafe the integrity of judicial review. In other words, our application of the substantial evidence rule should not be 'merely the judicial echo of the Board's conclusion'."

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4. AN EXAMINATION OF THE RECORD REVEALS THAT THERE IS NO EVIDENCE TO INDICATE THAT THE EMPLOYER HERE OWNED OR CONTROLLED THE TRANSPORTATION, AND NO SUBSTANTIAL EVIDENCE INDICATING THAT THE TRANSPORTATION WAS A PART OF THE CONTRACT OF EMPLOYMENT.

Armed with the new and "stiffer" standard established by the *Camera* case, we may examine the record to determine whether or not there is substantial evidence to support the Commissioner's finding that this injury arose out of and in the course of employment. This necessarily means that the Claimant

must have shown by substantial evidence that the transportation in which he was injured was owned or controlled by his employer, the Hastorf-Nettles Company, *and* that such transportation was contemplated by the contract of employment.

A. There is no evidence that the Hastorf-Nettles Company owned or controlled the means of transportation at the time of the injury.

It may be conceded that the record in this case justifies an inference that the Hastorf-Nettles Company had no transportation of its own whereby its employees might be transported between the labor camp and the job site on Fort Richardson, and that this necessary transportation was furnished by the Pomeroy Company, the general contractor. It further appears from the record that Pomeroy truck drivers frequently gave lifts to employees of other subcontractors between the mess hall and the labor camp and that at least on some occasions Pomeroy trucks had given men rides into Anchorage. The evidence shows that as to these latter acts, the Pomeroy Company had imposed no limitations on the use of trucks for this purpose, but on the other hand, had given no specific directions that they were so to be used.

There is a complete absence of evidence in the record as to whether or not the Hastorf-Nettles Company approved of any of these practices, sanctioned them, or even knew of them.

On the day in question, however, the particular Pomeroy truck involved was not being used for its

customary purposes on the army base; instead it had been taken without permission by Buhlman for purely recreational purposes to a point some forty-five miles away. Buhlman did not ask specific permission to make this trip and the attitude of his employer, the Pomeroy Company, toward it remains in doubt. Further, we are concerned here with the attitude of the Claimant's employer, the Hastorf-Nettles Company. It is at this point that the record completely fails to provide evidence from which it may be inferred that the Hastorf-Nettles Company contemplated an arrangement with the Claimant whereby he would be provided with transportation by the Pomeroy Company for purely recreational purposes. From all that appears from the record, there is nothing upon which to base even an inference that the Hastorf-Nettles Company had any control, whether indirect or direct, over the transportation in which the Claimant was injured upon the day of the accident. Thus the record lacks substantial evidence to justify the Commissioner's findings that the injury arose out of the course of the employment in this connection.

B. There is no substantial evidence that the furnishing of transportation was contemplated by the contract of employment.

The second test with which we are concerned is whether or not the transportation was furnished as a part of the contract of employment.

There is an indication in some of the cases that the scope of employment may be expanded to in-

clude certain recreational activities of employees in certain factual situations. These cases usually involve employment in an area remote from civilization where the employees live together in a company town. In such decisions, the facts indicate that the employer recognizes the need for recreation on the part of its employees and either furnishes recreational facilities in the company area or provides transportation for its employees so that they may seek recreation in areas distant from the camp and place of work. *Liberty Mutual vs. Gray,* supra. There are, however, cases to the contrary. *Arabian-American Oil Company v. I.A.C.,* supra.

In cases where transportation is furnished for recreational purposes and an injury arising out of this transportation is held compensable, we invariably find two factors present. First, that the remoteness of the area and the lack of nearby recreational facilities prompt the employer to assist its employees in seeking recreation at some distance from the place of work. Second, that because of the absence of good public transportation the employer allows the employees to use its own vehicles in their recreation.

The evidence in this case shows unequivocally that both of these factors are lacking. In the present day, Alaska can hardly be considered a remote wilderness area and our service installations there are not so far from familiar types of recreation as are those located on an island such as Okinawa. The evidence here shows that the Claimant lived in a labor camp only five or six miles from Anchorage, a

town of some 20,000 persons. It may be inferred that employees customarily sought their recreation in Anchorage, and indeed the record shows affirmatively that the Claimant was in the habit of doing so. The second familiar element is also lacking; the employer did not furnish any transportation for recreational purposes because there was not only a city bus but a taxi line connecting Anchorage and Fort Richardson. The bus line provided good service every half-hour or hour, and it was, therefore, unnecessary for any employer transportation to be furnished. Likewise, the employer did not give the employees any travel allowance.

Even if travel to and from Anchorage had been envisioned by the contract of employment though done for recreational purposes, it remains the fact that on the day in question the Claimant was on holiday and chose to go not to Anchorage but to the town of Palmer, some forty-five miles distant. This unusual act was occasioned because there was a Labor Day Fair at that town. It is again significant to note that the employee did not use his employer's transportation to reach his destination and in fact plainly had no thought of doing so throughout the trip, for he purchased a round trip ticket on the Alaskan Railroad. By pure fortuity he encountered Buhlman, a personal friend, and was offered a ride back to the camp.

As we have indicated, it must be from these facts that the Commissioner impliedly found that the transportation was furnished as a part of the contract of

employment, as such an implied finding is necessary as a basis for the finding that the injury arose out and in the course of the employment. However, as a recital of the facts indicates, it can hardly be said that there is "substantial evidence" to support this implied finding.

This is not a case where the employer loaded its truck with its employees and sent them off to the Fair for a day of recreation. Instead, the facts show that the Claimant sought recreation in this own way, at his own expense, using public transportation. Because of the courtesy of an employee of another employer, he happened to be injured. Under these circumstances, it cannot be said that the transportation had any reasonable connection with the employment and the second test is not fulfilled.

It follows that there is not substantial evidence to support the Commissioner's finding that the injury arose out of and in the course of employment. It is therefore respectfully submitted that the Commissioner's award should be vacated.

Dated, San Francisco, California,
May 16, 1952.

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Attorneys for Appellants.

No. 13,286

United States Court of Appeals

For the Ninth Circuit

HASTORF-NETTLES, INC. and UNITED PACIFIC INSURANCE COMPANY,
Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,
Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY.

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No. 13,286

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BRIEF FOR APPELLEE PILLSBURY.

STATEMENT OF CASE.

This is an appeal from an order and judgment of the United States District Court for the Northern District of California, Southern Division, Honorable Oliver J. Carter, District Judge, confirming a compensation order filed August 17, 1951 by Deputy Commissioner Warren H. Pillsbury, one of the appellees herein, in which he awarded compensation to Cecil Vogel on account of an injury sustained on September

4, 1950 while employed by appellant, Hastorf-Nettles, Inc. in the Territory of Alaska. The liability of such employer was insured by the appellant, United Pacific Insurance Company. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. sec. 901 et seq., as made applicable to employment at certain defense base areas and elsewhere by the Act of August 16, 1941, 55 Stat. 622, 42 U. S. C. A. secs. 1651-1654 hereinafter called the "Defense Bases Act."

FACTS.

In the compensation order complained of the deputy commissioner found the facts to be in part as follows:

> "That on September 4, 1950, the claimant above named was in the employ of the employer above named for the performance of service at a Defense Base and on a Public Works Contract of the United States in the Territory of Alaska in the 14th Compensation District, established under the provision of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Acts of Congress of August 16, 1941 and December 2, 1942, and that the liability of the employer for compensation under said Acts was insured by United Pacific Insurance Company; that on the said date claimant was quartered by the employer at a labor camp in a military reservation near Anchorage, Alaska, which bears the name of Fort Richardson; that the employer did not provide recreational facilities for its employees at said labor camp or on said military reservation and

that recreational facilities for such employees at said places did not in fact exist; that the employer herein was a subcontractor at said time and place of one Pomeroy and Company; that said prime contractor provided the transportation by automobile for said subcontractor and its employees as needed in the course of its operation; that it was customary for Pomeroy and Company drivers, as well as drivers of other cars and trucks, to pick up and give a ride to any workman on said base, whom they might pass and who were going in the same direction, irrespective of whether such workmen were going on business or otherwise; that on the said 4th day of September, 1950, which was a holiday, Labor Day, claimant for recreation went by train from Anchorage to a fair being held at Palmer, Alaska, about forty miles away, and on leaving said fair he was given a ride from Palmer back to Fort Richardson by a Superintendent of Pomeroy and Company in a Pomeroy Company truck which the latter had had assigned to him; that said truck met with an accident within the confines of Fort Richardson, in which claimant sustained the injuries which form the basis of the present claim for compensation; that the situs of said accident was on the main highway from Palmer through Fort Richardson to Anchorage, between the place where claimant performed his work and the labor camp where he was housed, and two or three miles before reaching the latter; that therefore claimant's injury arose out of and in the course of his employment with the employer herein;"

The claim for compensation which was filed by Vogel was controverted by the employer and insur-

ance carrier on the ground that the injury did not arise out of and in the course of employment. Both sides offered evidence at a hearing before the deputy commissioner on December 18, 1950 with respect to the issue controverted, and, upon the evidence adduced before him, the deputy commissioner, on August 17, 1951, issued the compensation order complained of whereby he awarded compensation to the injured employee.

The employer and carrier thereupon instituted a proceeding in the Court below to review the compensation order pursuant to the provisions of Section 21(b) of the Longshoremen's Act, 33 U. S. C. A. 921(b). A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The case came on for hearing before the district judge, who, by order entered January 29, 1952, granted the motion and, by judgment dated January 30, 1952, dismissed the complaint. The present appeal by the employer and its insurance carrier is from said order and judgment.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT SINCE THE RECORD VIEWED AS A WHOLE SUPPORTS A FINDING THAT VOGEL'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

A. Applicable Principles of Compensation Law.

General Principles.

The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of in the bill: *Grant v. Marshall, Deputy Commissioner,* 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerour,* 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, Deputy Commissioner,* 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal, Deputy Commissioner,* 49 F. Supp. 75 (W. Va. 1943); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949).

The findings of fact of the deputy commissioner supported by evidence on the record considered as a whole should be regarded as final and conclusive and not subject to judicial review: *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, Deputy Commissioner v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote v. Crowell, Deputy Commissioner,* 286 U.S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, Deputy Commissioner v. Motor Boat Sales Inc.,* 314

U.S. 244 (1941); *Marshall, Deputy Commissioner v. Pletz,* 317 U.S. 383 (1943); *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469 (1947).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Ins. Co. v. Gray, Deputy Commissioner,* 137 F. (2d) 926 (C.A. 9, 1943); *Michigan Transit Corporation v. Brown, Deputy Commissioner,* 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, Deputy Commissioner,* 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, Deputy Commissioner,* 23 F. Supp. 748 (N.Y. 1938); *Simmons v. Marshall, Deputy Commissioner,* 94 F. (2d) 850 (C.A. 9, 1938); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, Deputy Commissioner,* 150 F. (2d) 310 (C.A. 9, 1945); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, Deputy Commissioner,* 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. Inc. v. Norton, Deputy Commissioner,* 96 F. (2d) 764 (C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, Deputy Commissioner,* 141 F. (2d) 964 (C.A. 5, 1944).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, Deputy Commissioner,* 156 F. (2d) 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, Deputy Commissioner,* 150 F. (2d) 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner,* 309 U.S. 251 (1940); *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, Deputy Commissioner,* 137 F. (2d) 926 (C.A. 9, 1943); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.A. 3, 1940); *Henderson, Deputy Commissioner v. Pate Stevedoring Co. Inc.,* 134 F. (2d) 440 (C.A. 5, 1943); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson, Deputy Commissioner,* 168 F. (2d) 872 (C.A. 5, 1948).

B. The Evidence.

The record will be referred to as showing that the District Court was justified in dismissing the complaint, thereby holding in effect that there was substantial evidence in the record considered as a whole to support the deputy commissioner's finding that Vogel's injury arose out of and in the course of his employment.

Cecil Vogel, the claimant, testified in part: that he was employed as a steamfitter at Fort Richardson, Alaska on September 4, 1950; that he lived in a labor

camp at Fort Richardson five or six miles from Anchorage; that on the day of the accident (which was Labor Day) he had gone to a fair or exposition at Palmer; that the fair grounds were on the outskirts of the town of Palmer and he had returned to Palmer approximately in time to catch the train to Anchorage and at such time he met the carpenter superintendent of the Pomeroy Company; that he told this superintendent that he would have to catch his train (R-21);* that the superintendent said that he knew of a good place to eat in the vicinity of Palmer and invited the claimant to ride back to camp with him in lieu of using the train; that while en route to the camp in a pick-up truck which the superintendent was driving, and after having dined, they met with an accident (R-22); that the accident occurred within the reservation of Fort Richardson, a few miles from the labor camp where the employee and the superintendent had quarters; that the plaintiff-employer had a sub-contract from the Pomeroy Company; that claimant was continually riding in Pomeroy Company vehicles back and forth between the camp and the work site (R-23); and he also rode back and forth to work in his employer's trucks (R-24); that the quarters he occupied were furnished by the employer but there was no recreational facilities supplied at the camp for the employees; that he was assigned to the labor camp by his employer (R-25); that the name of Pomeroy's superintendent (with whom he was riding at the time of injury) was Rudolph Buhlman; that the truck the

*"R" refers to the printed Record on Appeal.

superintendent was driving belonged to the Pomeroy Company and had been assigned to the superintendent for his personal use (R-27); that the accident occurred about 10:30 or 11:00 in the evening (R-28); that the road on which the accident occurred was the same road which witness ordinarily traveled in going from the camp to the particular job site where he had been working (R-29); that the only vehicle of the plaintiff-employer which he had seen at the site of the construction work was a truck used by the plaintiff-employer's superintendent (R-30); that the accident occurred on the main road to the labor camp about two miles from the camp; i.e., on the reservation, but outside the labor camp area, which area consisted of a few blocks square in the center of the base (R-31); that in order to reach the labor camp, a person would have to proceed over the particular road and in the direction they were travelling when the accident occurred (R-32); that the road on which the accident occurred was the regular highway between Palmer and Anchorage, running through Fort Richardson (R-35); that trucks used by the Pomeroy Company to carry the employees back and forth to the jobs were driven by Pomeroy employees (R-37).

Rudolph Buhlman testified in part: that his position is superintendent for Pomeroy Company; that the truck which was involved in the accident was owned by the Pomeroy Company; that he was riding in the truck at the time of the accident (R-38); that the main road between Palmer and Anchorage runs through Fort Richardson; that the accident occurred on the main road (R-39); that he did not know

whether the trucks used by the Pomeroy Company and the plaintiff-employer were furnished by the Government or rented from the Government, but that Pomeroy truck drivers operated them; that every night certain employees went in pick-up trucks to the office in Anchorage in order to work and they were allowed to pick up other workmen; that on the day of the accident he had met the claimant in Palmer and asked him to go along (R-40); that before returning they had gone to a place above Palmer to eat; that he had proceeded to Palmer from the labor camp in the pick-up truck that day; that he had not sought permission to use the truck, since "they generally let you use them to go around" (R-41); that it was customary in driving to or from town to pick up other workmen and "everybody did it"; that the truck he was driving on the day of the accident was assigned to him full time; that there were no limitations placed upon him in respect to picking up employees who worked at the base; that he had been working on that job since July 10th or 11th and had worked for the Pomeroy Company for about five years (R-42); that the plaintiff-employer had only one pick-up truck of its own and that the Pomeroy Company carried the employees of the plaintiff-employer back and forth to work (R-42, 43); that the accident occurred within Fort Richardson after they had passed the gate (R-43); that he had had the use of the truck for about two months, kept the key and did not have to check in or out; that the company furnished the gasoline for the truck (R-43, 44); that when they gave him the truck no limitations were placed on him as

to where he could go, who could ride with him, or who could drive the car (R-44); that since it was customary to pick up workers "nobody ever walked" (R-46).

The record thus shows that the claimant was injured while returning to the labor camp of the plaintiff-employer. In this connection, it might be helpful briefly to review the history of "going and coming" rule as applied by the Courts.

In the beginning, when compensation laws were first enacted, the Courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The Courts, however, began to realize that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the Courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Company,* 288 U.S. 162, 169, the Supreme Court said:

> "The general rule is that injury sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment.

> Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstance of the particular employment. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Paramore,* 263 U.S. 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

In the *Voehl* case, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question whether the employee's injury arose out of and in the course of his employment should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of his work may arise out of and in the course of employment. *Swanson v. Latham and Crane,* 90 Conn. 87, 101 A.

492 (1917); *Larke v. Hancock Mutual Life Insurance Co.,* 90 Conn. 303, 97 A. 320 (1916), L.R.A. 1916E 584; *Cudahy Packing Co. v. Industrial Commission of Utah,* 60 Utah 161, 207 Pac. 148 (1922), 28 A.L.R. 1394; *Lumbermen's Reciprocal Association v. Behnken,* 112 Texas 103, 246 S.W. 72 (1922) 28 A.L.R. 1402; *Lamm v. Silver Falls Indemnity Co.,* 133 Or. 468, 286 Pac. 527 (1930); *Littler v. Fuller Co.,* 223 N.Y. 369, 119 N.E. 554 (1918); *Donovan's* case, 217 Mass. 76, 104 N.E. 431 (1914); *Creme v. Guest,* 1 K.B. 469.

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated in the *Voehl* case, *supra,* "no exact formula can be laid down which will automatically solve every case." But a brief review of recent cases involving that question will indicate the circumstances and factors which the Courts considered important.

In *Smith v. Industrial Accident Commission,* 18 Cal. (2d) 843, 118 P. (2d) 6 (1941), the employee was working on Treasure Island which was the site of the World's Fair at San Francisco. At the end of the day's work he got on a truck owned by the employer and rode along the roads of the exposition towards the terminal where he was to board a boat; on the way he was injured. The Court held that the

custom of the employees to ride this truck, coupled with the fact that the roads traveled were part of the employer's premises, were important facts to be considered in connection with the question whether the employee left the employment when he boarded the truck. The Court held that when transportation is furnished by the employer to convey a workman to and from his place of work *as an incident of the employment,* an injury sustained during tranportation *arises out of and in the course of employment.*

In the case of *Southern States Mfg. Co. v. Wright,* 146 Fla. 29, 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the Court (p. 376) said:

> "Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.
>
> "* * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there,* arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such trans-

portation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was* exercised in the furtherance of the employment." (Emphasis supplied.)

In the case of *Fritzmeier v. Texas Employers' Ins. Assn.,* 131 Tex. 165, 114 S.W. (2d) 236 (1937), the employee was hired as a tank builder on a job several miles distant from Gladewater. He did not live where the work was being performed. The employee resided at Gladewater, and rode each morning and back each evening with a truck driver in charge of the truck being used on the job. The employee and others were instructed to meet at a designated place at Gladewater in order to ride the truck and reach work on time. Fritzmeier was injured while en route to the place of work.

The Court affirmed an award of compensation under the foregoing facts, stating that the transportation was connected with the employment and that, even though the employer had not assumed the obligation of transporting the employee and his co-laborers, *yet it knew of the arrangement followed and plainly recognized the necessity of the method of transportation.*

In the case of *Lee v. Fish,* 196 A. 662 (N.J. 1938), decedent was in the employ of the respondent as a helper in his business as wholesale grocer. On the day in question, as was his custom, he went upon the truck of his employer preparatory to being taken

home after the course of the day's business. The truck was operated by the respondent's brother, who was the manager of the respondent's business. Decedent lived on the route between the employer's place of business and the garage where the truck was nightly stored. It was the custom of the employer, through his brother, to go for the decedent regularly on Sundays and take him to the respondent's place of business in order to aid the respondent in opening his business on time; this with the knowledge and acquiescence of the employer over a long period of time. Affirming an award of compensation made for fatal injuries sustained by deceased en route home, the Court (p. 662) said:

> "I am satisfied that the *furnishing of the said transportation by the employer was grounded in the mutual convenience and advantage of both the employer and employee. They engaged in this practice until the same ripened into custom.* It is clear that the *furnishing of the said transportation was for the benefit of both parties.* I feel that the same comes clearly within the rule established and so well expressed in the cases of *Rubeo v. McMullen Co.,* 117 N.J.L. 574, 189 A. 662; Id., 118 N.J.L. 530, 193 A. 797; *Salomone v. Ansetta,* N.J. Sup., 194 A. 798, and *Alberta Contracting Corporation v. Santomassimo,* 107 N.J.L. 7, 150 A. 830:
>
> > "'*The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work,* by direction of his employer, with his knowledge

> and acquiescence in the continued practice, which was beneficial to both the employer and the employee; and an injury sustained while so riding arises out of and in the course of his employment.' Alberta Contracting Corporation v. Santomassimo, supra." (Emphasis supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.,* 127 Conn. 528, 18 A. (2d) 400 (1941), the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck to ride home in. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The Court in affirming the award of compensation (p. 401) said:

> "An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;* to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Emphasis supplied.)

In the case of *Chrysler v. Blue Arrow Transportation Lines,* 295 Mich. 606, 295 N.W. 331 (1940), the employee was engaged in driving a truck between

Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The Court, affirming an award to the employee (p. 332), stated:

> "Solution of the problem in the present case is aided by the test suggested in the Konopke case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances,* there is either an express or implied undertaking by the employer to provide the transportation'.
>
> "In the case before us there was a clear undertaking on the part of the employer to furnish week-end transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town." (Emphasis supplied.)

In the case of *Rubeo v. Arthur McMullen Co.,* 118 N.J. Law 530, 193 A. 797 (1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee

was to be provided with transportation from his home to the site of the work but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the Court (p. 798) said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties,* at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction, of the employer, *into a practice grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for." (Emphasis supplied.)

In *Venho v. Ostrander Ry. & Timber Co.,* 185 Wash. 138, 52 P. (2d) 1267 (1936), plaintiff brought an action to recover damages for personal injuries sustained while riding a logging train from defendant's lumber camp to town. For about two weeks prior thereto, he had been employed in the woods as a "faller", but had ceased to work as such the evening before the accident, and, at the time he was injured, was on his way out from the camp to Ostrander. He alleged in his complaint that it was the *custom* of logging companies to transport employees on their logging trains to and from their camps. In order to support its contention that the sole remedy of the employee was under the compensation law, the defendant, Ostrander Railway & Timber Company, pleaded affirmatively that plaintiff was injured "in the course of his employment", and that he was entitled to relief under the workmen's compensation law. The question in the case was: Was plaintiff, at the time of his injuries, "in the course of his employment"? In deciding that he was the Court (p. 1268) said:

> "It is the general rule (to which this court adheres) that a workman injured going to or coming from the place of work is not 'in the course of his employment'. There is an exception, however, as well established as the rule itself. The exception, which is supported by overwhelming majority, is this: When a workman is so injured, while being transported in a vehicle furnished by his employer *as an incident of the employment,* he is within 'the course of his employment', as contemplated by the act. In other words, when the vehicle is supplied by the employer for *the mutual*

> *benefit of himself and the workman* to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. This exception to the rule may arise either as the result of *custom or contract, express or implied.* It may be implied from the nature and *circumstances of the employment* and the custom of the employer to furnish transportation." (Emphasis supplied.)

In the case of *Johnson v. Thompson-Sterrett Co.,* 42 Ga. App. 739, 157 S.E. 363 (1931), which involved an injury to an employee who was being transported home from work, the Court (p. 364) said:

> "Where it is the *custom* of an employer to transport employees to and from work, and the employees, with the knowledge and consent of the employer, use a truck furnished or designated by the employer for this purpose, the inference is authorized that the transportation of the employees, whether expressly a part of the contract or not, is one of the incidents of the employment, and where one of the employees, while being so transported, is injured by falling or jumping from the moving truck, the inference is authorized that the injury arises out of and in the course of the employment. Daniel Donovan's Case, 217 Mass. 76, 104 N.E. 431, Ann. Cas. 1915C, 778." (Emphasis supplied.)

In the case of *Alberta Contracting Corporation v. Santomassimo,* 107 N.J. Law 7, 150 A. 830 (1930), the employee was injured while riding home on a truck from the stone quarry where he worked which was

thirteen miles from the town where he lived. *There was no express agreement that the employee should adopt that method of transportation but for several months the employees had used that method with the knowledge and acquiescence of the employer.* On an appeal from an award of compensation made in the case, the Court (p. 831) said:

> "The court below found, and we think rightly, that decedent's death arose out of and in the course of his employment. It was argued below, and is argued here, that such finding was erroneous because the decedent 'was not engaged in his employment' while on his way to work.
>
> * * * * * * *
>
> "The case at bar is one of an obligation to be implied from the conduct of the employer, and is much like the case of Sava v. Pioneer Contracting Co., 103 Conn. 559, 131 A. 394.
>
> "We believe that the pertinent rule to be extracted from the cases is this: The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment. See Cicalese v. Lehigh Valley Railroad Co., 75 N.J. Law, 897, 69 A. 166; Depue v. Salmon Co., 92 N.J. Law, 550, 106 A. 379; Dunbaden v. Castles Ice Cream Co., 103 N.J. Law, 427, 135 A. 886; Bolos v. Trenton Fire Clay & Porcelain Co., 102 N.J. Law, 479, 133 A. 764, affirmed 103 N.J. Law, 483, 135 A. 915.
>
> * * * * * * *

> *"Whether the truck upon which decedent rode when injured was owned by the employer is immaterial, since the trucks were all in use in hauling stone in connection with the work, and sufficiently under the employer's control* to permit the carrying out of the arrangement for such transportation." (Emphasis supplied.)

The case of *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 286 Pac. 527 (1930) involves facts very similar to those in the instant case. It appears to be directly in point. The Court in that case analyzed and classified the various leading cases having to do with injuries sustained by employees while they are not actually working. The review is quite comprehensive. In view of the similarity of facts and the clarity of the opinion we are quoting extensively therefrom.

> "The plaintiff, after having been in the employ of the defendant for many months, engaged in logging operations, concluded to return to his home in Silverton on Saturday November 6, 1926, for a short visit; apparently he had no specific objective in mind which he had determined to accomplish during his absence from the defendant's camp. It is clear that neither he nor the defendant had any thought of terminating the plaintiff's employment, and that he expected to shortly return and resume his labors. Thus he retained his bunk house; his blankets, personal belongings, etc. remained in it at the defendant's camp, and in fact when he concluded his labors on Friday, the circumstances were no different than when he quit his work on any other day with the exception that he did not expect to resume his task the following Monday. On Tuesday, November 9th,

the plaintiff decided to return so that he could again resume his work on Wednesday morning, November 10th; such being his plan, he presented himself at the Silverton terminus of defendant's logging railroad and spoke to an employee in charge of the logging train which was about to start for the camp. He was accepted aboard the train, and in harmony with the uniform practice was charged no fare. This, together with the statement of facts contained in the previous decision which is reported in 277 P. 91, will suffice for the purpose of setting forth the relationship between the parties. It may be useful, however, to remind ourselves of a few facts concerning logging camps which are well known. Work in these camps is distinguishable from that in the factory in the important fact that the logger's employment is discharged at a place which is far removed from his home, places of recreation, and facilities for supplying his wants. * * * While the logger is staying at the camp with its bunk houses, limited boarding accommodations, and meager facilities for supplying the wants of life, he finds frequent occasion to quit work for short periods of time and visit the city. These temporary cessations from labor are due to the nature of the logging camp and the kind of work in which the men are engaged; * * *

* * * * * * *

"*From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ.* His work did not begin until the following morning; but his employment began when the defendant accepted the

plaintiff into its employ some months previously. Hence the employment continued not only while he was working for the defendant in the woods, but also upon his trip to Silverton and back.

"We come now to the more specific question whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions.
* * *

"One of the purposes of the Workmen's Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. Stark v. State Industrial Accident Commission, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana

Court in *Wirta v. North Butte Mining Co.,* 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964: 'The word "employment", as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * * * * * *

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * * * * * *

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Act is to grant compensation to an injured work-

man on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation. The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of and in the course of his employment', but bore in mind this general purpose of the act, as revealed by its entire text.

* * * * * * *

"The next group of cases which we shall review may be preceded by the following quotations from Wells v. Clark & Wilson Lumber Co., supra: 'Numerous authorities are cited by appellant to the effect that an employee going to or returning from his work or going to the place where he is employed to perform labor is "acting in the course of his employment", and is subject to the provisions of the Workmen's Compensation Act. This is sound law.'

"In the cases of the type adverted to by the above quotation, the employee was held entitled to the benefit of the act whenever his relationship to the industry subjected him to its hazards in a greater degree than an ordinary member of the public. It will be observed, as we proceed, that the mere fact that the morning whistle had not blown was immaterial; likewise, no controlling significance was attached to the fact, that the accident occurred upon a public street, and

that the tort-feasor was a third party. The rule expressed in Wells v. Clark & Wilson Lumber Co. is general. The cases which it suggests may be more specifically classified as follows: (1) An employee upon whom an injury is inflicted, while being conveyed to or from his work in a conveyance furnished by his employer as an incident of the contract of employment, is generally held entitled to compensation. (Citing many cases.)

* * * * * * *

"Applying the analogy of the foregoing cases, and the principles which we have endeavored to deduce from them, the conclusion comes irresistibly that, although the plaintiff's work would not resume until Wednesday morning, the employment began several months previously and continued during the trip from Silverton. Transportation to and from plaintiff's work upon these occasional trips was *incidental to his employment; hence, the employment continued during the transportation in the same way as during the work.* The injury, occurring during transportation, took place within the period of his employment, and at a place where he had a right to be, and while he was doing something incidental to his employment, because rendered necessary by the peculiar circumstances attending upon logging operations." (Emphasis supplied.)

It will be seen from the above discussed cases that in carrying out the humane purposes and intent of compensation laws the courts have not given the phrase "course of employment" a narrow, limited, or legalistic construction, such as limiting its meaning to the hours of actual physical labor. Injuries occurring out-

side such hours have been held to be compensable being predicated upon agreement of the parties either in express terms or as shown by custom or a course of conduct. *Customary practices* are important as showing such agreement or understanding, particularly where the employer knew or should have known of the local transportation arrangements or where the necessity for the arrangements was apparent and therefore made the kind of arrangements an incident of the employment, or where the arrangements constituted a mutual convenience and advantage to the employer and employees. The Courts have viewed such arrangements as within the contemplation of the parties at the time of the making of the contract of employment, and as implied from the nature and circumstances of the employment particularly in industries wherein the work site is far removed from the employees' homes, places of recreation and facilities for supplying their wants.

The most recent case on this aspect of compensation law is *O'Leary, Deputy Commissioner v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, decided February 26, 1951, in which the Court said that "compensation is not confined by common-law conceptions of scope of employment". In that case the workman was also employed by a Government contractor outside the continental limits of the United States. Unlike the case at bar, however, the employee in that case was *waiting for* his employer's bus to take him from a seaside recreation center (maintained by the employer for its employees). In an attempt to rescue two men standing

on a reef away from shore, he was drowned. The channel in which the drowning occurred was so dangerous that its use was forbidden for swimming purposes, and signs to that effect had been erected. Notwithstanding these facts, the Supreme Court held that the deputy commissioner's findings in support of his award of compensation "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole". In so ruling the Court reversed the Circuit Court which had concluded that "the lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation". In that case the Supreme Court (p. 508) stated:

> "We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness. It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained."

In the case at bar the claimant had "acted reasonably" (quotation is from *O'Leary* case, supra, 340 U.S.

504) in accepting the invitation of a superintendent to ride back to the labor camp with him. The more so since it had been customary to give workmen "a lift" under similar circumstances. In the words of the Supreme Court (in the same case), "the Deputy Commissioner could rationally infer that * * * [the claimant] acted reasonably in * * * [accepting the invitation], and that his * * * [injury] may fairly be attributable to the risks of the employment. * * * All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." In the instant case the employment at an isolated location plus the need for recreation outside the camp because it was not supplied at the camp plus the custom of riding in the vehicles of the general contractor, all combined to make the injury one which arose from an incident of the employment. From the circumstances related in the evidence and the apparent lack of trucks available for transportation of plaintiff-employer's employees, furnished by it, the inference is proper and reasonable that the plaintiff-employer could not have avoided knowledge of the transportation provided principally by Pomeroy for its employees—and the necessity therefor under the circumstances. See *Liberty Mutual Insurance Company v. Gray,* 137 F. (2d) 926 (C.A. 9, 1943) where the employee, as in the instant case was returning to the work camp after a trip to town for recreation purposes.

Appellants contend that the employee was not within the coverage of the Act at the time of injury because

the automobile in which he was riding was not under the "control" of the employer. In this connection, the Supreme Court stated in *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469, 480:

> "There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer contracted to and did furnish transportation to and from work. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Parramore,* 263 U.S. 418, 424; *Voehl v. Indemnity Ins. Co., supra,* 169. Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason *it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment.* The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. *Ward v. Cardillo, supra. And in situations where the journey is in other respects incidental to the employment,* the *absence of control* by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment. See *Cudahy Packing Co. v. Parramore, supra; Voehl v. Indemnity Ins. Co., supra.*" (Emphasis supplied.)

Appellants likewise base their position upon another misconception (p. 20) namely that the furnishing of the transportation (during which the injury occurs) must have been contemplated by the contract of employment. There is no such requirement and appellants cite no authority in support thereof. It may happen that the transportation is furnished pursuant to the employment contract; in many instances however the practice develops without any express understanding or agreement; it develops from the nature and circumstances of the employment itself in which event it becomes an incident of the *employment,* not of the *employment contract.* The Supreme Court correctly used the term in the *Cardillo* case *supra* 330 U.S. 469 when it stated:

> "* * * And in situations where the journey is in other respects *incidental to the employment* * * *"

This is the usual test of causal relationship between the injury and the employment, namely the incidentalness of what the employee is doing at the time of injury to the employment. In this category are such acts as eating, smoking, getting a drink of water, seeking fresh air, going to the toilet etc., none of which are done pursuant to the employment contract but which are incidental to the employment.

In view of all of the above could it be said as a matter of law that riding on a truck of the general contractor to or from town on a week-end or holiday from an isolated labor camp in Alaska, for the pur-

pose of relaxation and recreation is not incidental to the employment, particularly where it was the custom and practice to do so?

Lamm v. Silver Falls Timber Co., supra, 133 Ore. 468, 286 P. 527 (1930);

Liberty Mutual Ins. Co. v. Gray, supra, 137 F. (2d) 926 (C.A. 9, 1943);

O'Leary v. Brown-Pacific-Maxon Inc., supra, 340 U.S. 504.

O'Leary v. Brown-Pacific-Maxon Inc., 340 U.S. 504.

Appellants have cited *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474 as authorizing a new scope of review of administrative actions. In *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, decided on the same day, which also involved judicial review of an award under the Defense Bases Act, the Court set the standard of review in the following words:

> "The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. ....., 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. The District Court recognized this standard."
>
> * * * * * * *
>
> "We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness.

> It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained."

It is to be noted that the Court did not in that case indicate that the evidence will be weighed on review. In fact footnote 21 of the *Universal Camera* case indicates a contrary intention, namely not to weigh the evidence. Accord: *U. S. Fidelity and Guaranty Co. v. Britton,* 188 F. (2d) 674 which was decided after the *O'Leary* case and cited it. Cf. *Pittston Stevedoring Co. v. Willard,* 190 F. (2d) 267 also decided subsequent to the *O'Leary* case.

CONCLUSION.

In view of the above, it is respectfully submitted that the District Court properly refused to set aside the deputy commissioner's award as "unsupported by substantial evidence on the record considered as a whole", or to find that the deputy commissioner's

award was not in accordance with law. The order and judgment appealed from should be affirmed.

Dated, San Francisco, California,
June 18, 1952.

Respectfully submitted,

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No. 13289

In the

United States

Court of Appeals

For the Ninth Circuit

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent.*
CITY OF TACOMA, *Intervener.*

REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

OPENING BRIEF FOR PETITIONERS

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STATUTES

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REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

OPENING BRIEF FOR PETITIONERS

I. JURISDICTIONAL STATEMENT

1. Jurisdiction of this Court is based upon Section 313(b) of the Federal Power Act, U. S. C., Title 16, Section 8251; and is also based upon Section 10 of the Administrative Procedure Act, U. S. C., Title 5, Section 1009. This Petition for Review is made for the purpose of reviewing certain orders of the Federal Power Commission.

2. The pleadings and facts necessary to show the existence of the jurisdiction are as follows:

Application was filed on December 28, 1948, and later supplemented by the City of Tacoma, Washington, for a license under the Federal Power Act for a proposed hydroelectric development designated as Project Number 2016, to be located on the Cowlitz River in Lewis County, Washington (Tr. 1).

The two State Departments are parties to this proceeding by virtue of an order of the Commission permitting intervention, issued October 23, 1950 (Tr. 32). Washington State Sportsmen's Council, Inc. is a party to this proceeding by virtue of an order of the Commission permitting intervention, issued October 30, 1950 (Tr. 40).

Following public hearings, submission of testimony, exhibits and briefs, a recommended decision by the Presiding Examiner, exceptions filed thereto and oral argument, the findings and basic order now under review were issued on November 28, 1951 (Tr. 537).

On December 26, 1951, within the time prescribed by statute, Petitioners filed with the Commission their Petition and Application for Rehearing (Tr. 460).

On January 24, 1952, the Commission issued its order denying such Petition and Application for Rehearing (Tr. 579).

Within the time prescribed by statute and on March 12, 1952, the Petition for Review was filed in this Court (Tr. 686).

II. STATEMENT OF THE CASE

The Parties.

The State of Washington is a Sovereign State of the United States, and the State of Washington Department of Game and the State of Washington Department of Fisheries are each a department and subdivision thereof, charged with the duty of enforcing its laws, rules and regulations relative to the conservation of food fish and game fish.

The Washington State Sportsmen's Council, Inc. is a non-profit corporation organized under the Laws of the State of Washington, with a membership of over 20,000 residents of the State and is dedicated to the preservation and protection of the resources of the State of Washington and their recreational value to the citizens thereof.

The Federal Power Commission is an administrative body of the Federal Government entrusted with the administration of the Federal Power Act.

The City of Tacoma is a Municipal Corporation of the State of Washington, incorporated under the laws of said state.

The Proposed Project.

The project proposed by the City of Tacoma would consist of two dams on the Cowlitz River, one at Mossyrock and the other at Mayfield, together with appurtenant reservoirs, generating facilities, and alleged fish protective facilities.

The Mossyrock Dam located at river mile 65, would rise 325 feet above tailwater and its reservoir would extend some 21 miles upstream.

The Mayfield Dam located at river mile 52, would rise 185 feet above tailwater and its reservoir would extend upstream to the tailwater of the Mossyrock Dam, a distance of about 13½ miles.

Conflict with State Laws.

Both of these dams are situated within the migratory range of the anadromous fish that utilize the Cowlitz River and their construction is expressly prohibited by the State Statute, commonly called the Sanctuary Act, which makes fish sanctuaries out of the Cowlitz River and other lower Columbia River tributaries and prohibits the construction of dams over 25 feet in height on such rivers within the migratory range of anadromous fish. This statute is fully set forth and discussed in the argument herein.

The City of Tacoma has not obtained a hydraulic permit from the State for the construction of the dams and the right to use the water of the river as required by the state law.

It has likewise failed to obtain the approval of the Director of Fisheries and the Director of Game of the State of Washington for its proposed fish protective facilities in connection with the dams as required by state law.

Power Situation.

The City of Tacoma is a participating member of the Northwest Power pool which consists of all of

the principal generating facilities of the northwest, and which are so inter-connected and operated that the entire generating facilities of the region are placed in a common pool to serve the demands of the area as an integrated system (Tr. 1061-1064). At the present time the power generating facilities of the City of Tacoma, together with purchases from Bonneville Power Administration, are ample to meet its present power requirements. As a municipality, the City of Tacoma enjoys a preferential right to the purchase of Bonneville Power and could increase its purchases from that agency if necessary. Because of its preferential status as a municipality and because of the integrated operation of the Northwest Power pool, it is necessary to consider the power situation for the entire area served by the Northwest Power pool in order to properly evaluate the power value of the city's proposed project. In this connection, as is fully set forth in the record, it is important to note that there are presently under consideration, or authorized for construction, many major generating facilities in the upper Columbia River Basin which will furnish substantially additional power to all participants of the Northwest Power pool, including Tacoma. The city contends that the Cowlitz projects would be of considerable value to itself and the other members of the power pool since it is capable of being constructed within a three-year period and could be expected to furnish power before some of the federal construction can be completed. The attention of the Court is respectfully directed to

Appendix C to this brief in which the Examiner sets forth a scholarly discussion of Tacoma's need for additional power as related to regional needs.

The River and Its Fishery.

The Cowlitz River drains the western slope of the Cascade Range from Mount Rainier south to Mount Adams and Mount St. Helens, all in southwestern Washington. From its headwaters in the glaciers of Mt. Rainier the river flows generally southwest a distance of 67.7 miles to its junction with the Columbia River at Longview, Washington. The entire river and all of its watershed are wholly within the State of Washington.

The watershed of the Cowlitz is in a remote and isolated part of the state. Except for some areas which have been logged, almost all of the watershed remains in a natural, primitive condition. The watershed is almost entirely devoid of industrial development, and the river and its tributaries have but few diversions for agricultural or domestic purposes. The flow of the river system is largely the same as it was prior to the advent of the white man's civilization. This fact, together with the temperature, food content and chemical qualities of the water, make the river system an ideal environment for the propagation of anadromous fish (Tr. 2929-2932, Ex. 30, p. 1).

The Cowlitz River is the most important producer of fish in the lower Columbia River system (below Bonneville Dam) and in the entire Columbia

basin is exceeded in this respect only by the Snake River (Tr. 2932, 2388, Ex. 30, p. 1).

The principal species of fish produced in the waters of the Cowlitz are spring Chinook salmon, fall Chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt. (See Biological Supplement in Appendix.)

The gross annual value of the salmon produced in the river has been conservatively placed at $2,000,000.00, with about half being produced above the Mayfield dam site and half below (Ex. 30, p. 2; Tr. 2854; Ex. 25, pp. 7-8).

The steelhead and cutthroat trout are not fished commercially but provide an important recreational fishery difficult to measure in a monetary manner, and which contributes greatly to "better living" in the area (Ex. 25, p. 5).

The smelt, whose annual commercial value has been as high as $300,000.00, spawn in the main river below Mayfield (Tr. 2972).

The Comprehensive Plan for the Columbia Basin.

To evaluate properly the importance of the Cowlitz as a producer of fish and to weigh this value against the power benefits to be derived from the proposed project, it is necessary to briefly note some of the history of the Columbia River basin and the plans of private, state, and Federal agencies for its development.

Before the arrival of the white man in the northwest the entire Columbia River system, from its

headwaters in Canada to its mouth, was extensively used for the propagation of anadromous fish, particularly salmon (Tr. 3595-3596; Ex. 43-A). However, civilization brought environmental changes such as divided watersheds, industrial pollution, irrigation diversions, and physical barriers such as dams, log jams, etc., that have made vast portions of the river system either unsuitable or inaccessible for anadromous fish. The Coulee Dam alone made inaccessible hundreds of miles of what were once excellent spawning grounds for salmon. The same result has been accomplished on a smaller scale by dams on tributary streams. It is presently estimated that when all dams now in construction, or authorized for construction, are completed, that more than 70% of the entire river system will be forever lost for fish propagation (Tr. 3597-3610, Ex. 43-6).

The preservation of a substantial part of the remaining fish populations in the Columbia River system has been a matter of great concern to the state and Federal agencies responsible for planning the orderly development of the Columbia River basin, and after exhaustive study and analysis they have prepared a program which, if followed, will permit the development of all of the resources of the area without the sacrifice of any.

This plan is set forth in the "Review Report on Columbia River and Tributaries", prepared by the Corps of Engineers, and officially noted in this matter. The report was submitted to the Secretary

of Army on June 28, 1949, and was thereafter submitted to Congress.

Basically, the plan provides for the development of the upper river system for power, reclamation and related purposes and the preservation of the lower river system for the propagation of fish.

The plan is much too lengthy to review in detail. Suffice to say that it reviews in detail the potentialities of all the streams in the river systems and outlined the manner in which they might best be developed to serve the economy of the area (Tr. 93-102).

In this connection it is pertinent to note that the report outlines in detail the resources of the Cowlitz River system and specifically notices the power potential of the Mayfield and Mossyrock sites. However, the development of the river for power, flood control and navigation is not recommended because of the conflict with the fishery resources of the river (Tr. 99).

After agreement was effected between the Corps of Engineers and the Bureau of Reclamation, the plan was submitted for comment to various Federal agencies, including the Federal Power Commission. On June 21, 1949, the Commission wrote the Chief of Engineers a letter in which it approved the plan as constituting a "desirable and coordinated basic framework for the comprehensive development and utilization of the water resources of the Columbia River" (House Document 531, Tr. 98).

The Lower Columbia River Fisheries Plan.

As a supplement to the comprehensive plan the U. S. Fish & Wildlife Service developed the Lower Columbia River Fisheries Plan. This plan was officially noted by Chief of Engineers who recommended favorable consideration of the plan by Congress (Tr. 86-93).

The fisheries plan provides for increasing the fish producing potential of the Lower Columbia River streams, including the Cowlitz, by stream improvement, removal of barriers, hatcheries, abatement of pollution, screening of diversions, etc. (Tr. 88). Under the plan the actual work would be financed by Federal funds and would be performed by the States of Oregon and Washington under the supervision of the U. S. Fish and Wildlife Service (Ex. 33).

While Congress has not formally approved this plan, it provided $1,000,000 in 1949, $1,100,000 in 1950, and $2,205,000 in 1951, to carry out the program which contemplates the expenditure of $20,000,000 over a ten year period (Ex. 30, p. 1).

The wholehearted endorsement by the State of Washington of the comprehensive plan and the fisheries plan is evidenced by the action of its legislature, which in 1949 passed what is commonly referred to as the "Sanctuary Act", which is fully set out hereafter. The law, in effect, makes fish sanctuaries out of the tributaries of the Lower Columbia River, including the Cowlitz, and prohibits the construction of structures in the rivers over 25 feet in height. There

is no dispute that the terms of the Act prohibit the construction of the dams in question.

Another independent agency has studied and reported on the problem of best utilizing the water resources of the Columbia basin. The President's Water Resources Policy Commission discusses the Columbia at length in Volume 11, "Ten Rivers in America's Future". The problem of the Cowlitz is specifically mentioned (Tr. 189-195). The view of the President's Commission can be best summarized by stating that they agree with the opinion of the Corps of Engineers that the greatest good will be accomplished by preserving the integrity of the Lower Columbia River Fishing Plan by deferring multi-purpose development of sanctuary streams (including Cowlitz) until the power requirements of the future make necessary the development of the full power potential of the entire Columbia River system (Tr. 189-195).

While the U. S. Fish and Wildlife Service did not appear as a party in this controversy, two of its staff appeared and stated that their views and the material they presented represented the official view of the department and had been formally approved by the department's highest officials. One of these, Mr. Barnaby, in speaking of the Columbia River fisheries plan, stated, "The Cowlitz may be considered as a keystone of that program and nothing should be done that might diminish or jeopardize its present or potential productivity". (Ex. 30, p. 2.)

He was also of the opinion that the program might as well be abandoned if the dams are built.

The foregoing constitutes the policies determined by all interested agencies at the time the city's application was under consideration by the Federal Power Commission (See Appendix B).

Against this background the case was heard by the Federal Power Commission. Over 4,000 pages of testimony were taken.

It should be noted that the suitability of the proposed sites for the generation of power (if all other considerations were ignored), the adequacy of the designs (excluding fish protective facilities), and the ability of the City to finance the same were never in issue.

The Proposed Fish Facilities.

Most of the testimony was devoted to the question of whether the proposed fish facilities, or any fish facilities that might be proposed in view of the available knowledge on this subject, would be able to preserve the runs of fish now utilizing the river. The Petitioners, as interveners in the above proceedings, produced 13 expert witnesses on this subject. They constituted a group of trained biologists and engineers who for years have worked in the salmon resource field and who, individually, and as a group, have participated in the design of every major salmon protective facility in our country and Canada. They were of the opinion that there is no known method of maintaining productive runs of

fish above these proposed dams. They were further of the opinion that the proposed dams would have a damaging effect on the runs of fish below the dams (Ex. 30, pp. 3-6; Tr. 2141, 2924, 2921, 3006, 3264, 3265).

The applicant (City) produced but one expert witness on this question. While his general background as a fishery biologist was broad, his experience with salmon was limited and his participation in the design of salmon protective facilities was nil. He, alone, among all the experts, held hope that the protective facilities could be made to work, but conceded that more experimentation was needed (Tr. 1692, 1693, 1697, 1698, 1699, 1700, 1703, 1704, 1705, 1710, 1722, 1725, 1727, 1731, 1737, 1738).

The attention of the court is respectfully directed to Appendix D which contains the Biological Supplement to Recommended Decision. In these pages the Presiding Examiner has compiled a masterful review of the biological testimony. He outlines in detail the life cycle and habits of the various species of fish, the facilities planned for their protection, the possibilities of artificial propagation, etc.

The Examiner's Proposed Order.

After hearing all of the testimony, reviewing the exhibits and considering the briefs of the parties, the Presiding Examiner rendered his recommended decision (Tr. 171-225). It is most unfortunate that its length prohibits its reproduction herein. The issues in this controversy are fully and fairly

stated and the benefits and disadvantages inherent in the applicant's proposal are judiciously weighed. For many compelling reasons, fully set forth in his recommended decision, the Presiding Examiner recommends that the policies established by the Corps of Engineers, the Bureau of Reclamation, the U. S. Fish and Wildlife, the Department of Interior, the President's Water Resources Policy Commission and the State of Washington be followed and that, therefore, the application be denied without prejudice.

The Commission's Order.

In complete disregard of the Examiner's recommended decision, the well considered policies of the other Federal agencies, and of the laws of the State of Washington, the Commission entered its order granting the license (Appx. A).

Issues Involved.

It is the position of the petitioners that the State Sanctuary Act and the city's failure to comply with the other state laws in relation to hydraulics and fish facilities constitute a complete legal bar to the construction of these dams by the city and the issuance of a license for such construction by the Federal Power Commission.

The petitioners also contend that these dams will constitute a complete barrier to migratory fish and will result in the loss of all migratory fish spawning above the dams, as well as substantially diminishing the fish productivity of the river below the dams, and that there is no substantial evidence in the record

to justify a finding that the proposed project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses including recreational purposes;" as required by Section 10(a) of the Federal Power Act.

The petitioners likewise maintain that the Commission's opinion and order granting the license is fatally defective in many other particulars in that it is vague, contradictory, arbitrary, capricious, contains essential findings not supported by substantial evidence, fails to make findings required by the record, involves the sovereign powers of the state, exceeds the power of the commission, and in other respects, all of which are fully set forth in the assignments of error and argument herein.

III. SPECIFICATION OF ERRORS

For the purpose of clarity and because the Order of November 28, 1951, contains sixty-six separate Findings, eight additional Provisions denominated as "Articles" and by reference incorporates its twelve-page Opinion No. 221 into the Findings, we have grouped the Specification of Errors into the three major groups under which these Specifications of Error will be argued. For this reason, also, our Specifications of Error are necessarily more detailed than they otherwise would be. We will number these Specifications of Error consecutively.

As so numbered and grouped, the Findings and Order of the Commission in project number 2016 are erroneous in the following particulars:

Assignments of Error Relating to Jurisdiction and Legal Authority of the Commission to Enter Its Order of November 28, 1951.

1. Finding No. 53 of the Commission to the effect that the City of Tacoma has submitted satisfactory evidence in compliance with the requirements of all applicable laws of the State of Washington insofar as is necessary to effect the purposes of a license is not supported by substantial evidence, and in such Finding the Commission has exceeded the authority conferred upon it by the Federal Power Act and such Finding is arbitrary, capricious and an abuse of discretion, for the construction of these dams is prohibited by the laws of the State of Wash-

ington and will involve the destruction of a valuable state resource.

2. Finding No. 53 by the Commission is contrary to Section 9 (b) and Section 27 of the Federal Power Act in that Applicant has not complied with the Water Code of the State of Washington as required by said sections.

3. The Order of November 28, 1951, and the Order of January 24, 1952, constitute administrative legislation violative of the provisions of the Constitution and laws of the United States; and the imposition thereof constitutes an abdication of the Commission's function as an independent agency of the United States, in contravention of the statutes creating the Commission and granting its authority, and said orders are arbitrary, capricious and an abuse of discretion in that they are not authorized by the Federal Power Act or by any statute or by any delegation of power to the Commission, or otherwise.

4. The Orders of the Commission of November 28, 1951, and January 24, 1952, deprive Petitioners of their property and property rights without due process of law and are in contravention of the Constitution of the United States.

5. The City of Tacoma, as a municipal corporation, has no rights apart from the State of Washington, nor in derogation of state laws, and, therefore, the said City cannot be licensed by the Federal Power Commission to build these dams.

Assignments of Error Predicated Upon the Lack of Substantial Evidence in the Record to Support the Several Basic Findings and Conclusions as Contained in the Order of November 28, 1951.

6. The Commission has exceeded the power conferred upon it, has not fulfilled the obligation imposed upon it by Section 10 (a) of the Federal Power Act, and upon the entire record has acted arbitrarily and capriciously.

7. Error is assigned to Finding No. 59 of the Commission for the reasons hereinafter set forth.

The Commission in such Finding states:

> "Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes."

Finding No. 59 of the Commission is not supported by substantial evidence, is at complete variance with Findings No. 36, 37, 38 and 39, is arbitrary, capricious and constitutes an unlawful extension of the power conferred upon the Commission by the Federal Power Act and destroys the established comprehensive plan of the Columbia River Basin area and its integrated Lower Columbia River Fishery Plan providing for the maximum development of the Lower Columbia River and tributaries thereof as a

part of the Columbia Basin by written agreement between the states of Washington and Oregon and the United States Fish and Wildlife Service of the Department of the Interior, and which plan excludes the Cowlitz and other rivers entering the Columbia below Bonneville Dam as power producers.

8. Error is assigned to Finding No. 66 of the Order of November 28, 1951, for the reason that the same misinterprets the contents of the report of the Secretary of the Interior and said Finding is not supported by substantial evidence.

9. Error is assigned to the Finding and Conclusion that there now is and will continue to be a severe power shortage in the Pacific Northwest for the next seven to ten years and that a Federal Program of construction will not alleviate that condition, and to each and every reference thereto, because such a Finding and Conclusion is not supported by substantial evidence, but on the contrary, the record affirmatively shows that with median water conditions, there will be no severe power shortage in the Pacific Northwest.

Specifically, we assign as error the following:

Opinion, Page 2, Lines 13 and 14: " * * * the serious regional power shortage in this area will not be met by the planned Federal Power Construction * * * ".

Finding No. 16, insofar as it infers that the present estimate of when new generating units

would be placed in operation in the Columbia River Basin will not be fulfilled.

Finding No. 17, Lines 2 to 4: "There will not be firm power available to supply full potential loads until after 1958."

Finding No. 20, indicating a deficiency of dependable capacity of the Northwest region until about 1960, a deficiency in dependable capacity in 1955 of about 430,000 kilowatts, a deficiency of plant capability of as much as 870,000 kilowatts and referring to the effect of an adverse water year prior to the year 1954.

Finding No. 21, "As the Northwest region will continue to be deficient in power supply for approximately the next ten years * * *".

10. Error is assigned to the Finding and Conclusion that construction of the dams as proposed by Applicant will alleviate, or at least materially assist in alleviating, any power shortage, and to each and every reference thereto, because such a Finding and Conclusion is not supported by substantial evidence, but, on the contrary, the record affirmatively shows that these dams could not be constructed in time to have, at the most, but a minor and temporary effect upon the power situation in the Pacific Northwest.

Specifically, we assign as error the following:

Opinion, Page 1, Lines 15 and 16: "Three years would be required after authorization before the proposed plants could be placed in operation."

Opinion, Page 2, Lines 16 and 17: "The installation can be made with a minimum loss of time and with maximum assistance to other power suppliers."

Opinion, Page 12, Line 10: "large power benefits."

Finding No. 22, Lines 4 to 7: "Because of its size, location and characteristics of power output, the project will be an exceptionally valuable addition to the Northwest region's power supply and will relieve to some extent the power shortage which may continue for almost a decade."

Finding No. 23, Lines 8 to 10: "if made within three years would assist greatly in alleviating the power shortage in the Northwest region."

11. Error is assigned to the Finding and Conclusion that there are no alternate sources of power which will supply the energy capable of being produced by the Applicant's project, and to each and every reference thereto, because such Finding and Conclusion is not supported by substantial evidence. The record affirmatively shows that other projects now licensed and ordered can supply the full amount of power to be produced by the Cowlitz dams, and in a shorter period of time; that Applicant could itself construct a steam plant which would supply the same power and have the same benefits by way of diversification as the Cowlitz dams; and that other steam plants could be built which would supply an equal or

greater amount of power than would the Cowlitz dams and which could be constructed in far less time.

Specifically, we assign as error the following:

Finding No. 26: "On the basis of the evidence in this record, none of the hydro-electric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project."

Finding No. 28: "The only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line by 1954 consist of the proposed Cowlitz Project and new steam electric plants."

The failure of the Commission to make any finding regarding the availability of Federal steam plants as proposed in House Resolution No. 4963.

12. Error is assigned to the Finding and Conclusion that immediate authorization and construction of the project proposed by Applicant is necessary in the interest of National Defense, because the record in no particular supports such a Finding or Conclusion.

Specifically, we assign as error the following:

Opinion, Page 2, Line 12: "The expanding defense requirements, which must be met."

Opinion, Page 12, Line 10: "needed particularly for defense purposes."

Finding No. 13, referring to the advent of the national emergency and implying that the power shortage at the present time is due to that cause.

Finding No. 18, insofar as it refers to the national emergency and the power supply.

Finding No. 20, Line 5, referring to new defense loads.

13. Error is assigned to the Finding and Conclusion that benefits to be derived from the Cowlitz Project outweigh the fishery values and all other considerations because such Finding and Conclusion is not in accord with Section 10 (a) of the Federal Power Act and is not supported by substantial evidence. For purposes of clarity we wish to group the several portions of the Opinion and Findings in five principal divisions.

As so grouped, we assign as error the following:

a. Those portions of the Opinion and Findings referring to flood control and navigation benefits, reference thereto appearing in the Opinion, Page 2, Lines 25 and 26; Opinion, Page 7, Lines 19 and 20; Finding No. 25 and Finding No. 32. The Cowlitz is not a river with a severe history of floods and while any storage dam will have some benefit, from a flood control standpoint, the record does not support a Finding that "large flood control benefits" will result. The Commission itself in Lines 25 and 26 on Page 2 of its Opinion, classifies navigation benefits as incidental, yet later they are grouped with flood control and assigned major importance. There is no evidence in the record that navigation benefits would be of any appreciable value whatsoever.

b. That portion of the Opinion contained in Lines 1 and 2 on Page 7, referring to beneficial reduction of pollution; the record does not support this statement.

c. Those portions of the Opinion and Findings wherein the fisheries and recreational benefits are given but minor value. Specific reference thereto appears in the Opinion, Page 7, Lines 7 to 19; Opinion, Page 8, Lines 1 and 2; and in Findings 43 to 47, inclusive.

d. Finding No. 8, referring to "substantial recreational opportunities" in relation to the two proposed reservoirs.

e. In addition to the foregoing, the Commission, at Page 12 of its Opinion, in Lines 10 to 12, inclusive, concludes the Opinion by balancing what are classified as large power benefits, flood control benefits and navigation benefits, plus incidental recreational and intangible benefits against "some fish loss."

We also assign as error that portion of the Opinion on Page 12, Lines 13 to 15, and reading "or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization."

14. The Commission erred in finding that substantial portions of the runs spawning in the river system above the Mayfield dam site can be saved if the dams are constructed, because such Finding is not

supported by substantial evidence in the following particulars:

The statement appearing on Page 10 of the Opinion, to-wit:

> "While there are several biological and engineering problems to be solved in connection with the laddering system, the record clearly does not support a rejection of the proposal at this time."

The first complete paragraph appearing on Page 10 of the Opinion, to-wit:

> "Regardless of the details of the methods used, the record shows that adult fish are being passed upstream by high dams successfully and that by trapping and hauling on the Cowlitz fish could be taken past the proposed Cowlitz Dams."

The statement appearing on Page 11 of the Opinion, to-wit:

> "The problem of screening should not be difficult of solution."

The statement appearing on Page 11, to-wit:

> "If the fingerlings can be induced to enter the ports along the upstream face of the Mossyrock Dam the problems of pressure and movement through the dams would be largely engineering."

To that portion of Finding No. 41 relating to the fingerling device and stating "the record does indicate that with proper testing and experimentation, it should be possible to provide fish handling devices of the type proposed which will prevent undue losses of downstream migrants."

The Order fails to find that there will be inevitable losses at each of the fish protective devices regardless of their ultimate efficiency and which, in the accumulative, will render the runs above the dam non-productive.

15. Error is assigned to the Finding that the runs spawning in the river below the dams will not be substantially injured (second full paragraph, Page 6 of the Opinion and Finding No. 48), because said Finding is not supported by substantial evidence.

16. Error is assigned to Finding No. 42, insofar as it foresees the possibility of any substantial benefit from the Applicant's proposed conservation practices, facilities and improvements of fish habitat, for the reason that such Finding is not supported by substantial evidence.

17. Finding No. 47 by the Commission, referring to hatcheries, their probable cost of construction, operation and maintenance, and the values arrived at in Findings No. 49, 50 and 51, are not supported by substantial evidence.

Assignments of Error Relating to the Specific Provisions and Articles of the Order of November 28, 1951, insofar as They Do Not Provide Properly for the Effectiveness of the Fish Protective Devices, Provide for Management of a State Resource by a Municipality and Purport to Provide for Further Proceeding Without Opportunity for Petitioners to Be Heard.

18. Articles 30 and 31 and paragraph C of the Order granting the license constitute an unlawful

extension of the authority of the Commission under the Act, are arbitrary, capricious and an abuse of discretion and not in accordance with law in that they provide for inadequate testing and experimentation of fish protective devices, make no adequate provision for the determination of the effectiveness of the same, provide for approval of the fisheries devices and plans by the Commission rather than by the State of Washington as required by state law, do not require the City of Tacoma to prove the effectiveness of the proposed fish protective facilities and provide for the management of state fishery resources by the city under the sole direction of the Commission, to the exclusion of the sovereignty of the State of Washington.

They are also defective in that, when considered in connection with Article 28, the period for tests and experimentations is largely limited to two years. As has been previously pointed out, the effectiveness of many of the untested portions of the fish protective facilities can only be determined after they have been tested over the life cycle of several runs of fish.

19. The Order of November 28, 1951, is arbitrary and capricious and not in accord with the provisions of the Federal Power Act in that it directs issuance of the license and permits commencement of the construction of the dams by Applicant before the effectiveness of the proposed fisheries facilities are determined, and fails to require Applicant to

prove the effectiveness of its proposed fish protective facilities.

20. Articles 30 and 31 of the Order of November 28, 1951, constitute an unlawful extension of the authority of the Commission under the Federal Power Act and are arbitrary, capricious and an abuse of discretion in that they provide for further essential proceeding relating to the fish protective devices without opportunity for Petitioners to be heard, and are indefinite and inadequate in that Petitioners cannot be advised of their rights.

IV. SUMMARY OF ARGUMENT

The Federal Power Commission was without jurisdiction to enter its Order of November 28, 1951, and in so doing has exceeded the authority conferred upon it by the Federal Power Act, for the City of Tacoma has not complied with applicable laws of the State of Washington.

The State Sanctuary Act, which expressly prohibits the building of any dam in excess of 25 feet in height upon the Cowlitz River, is a valid enactment of the State of Washington in the exercise of its police power, as are other state statutes relating to water uses and the fishery resources of the state. Finding No. 53, therefore, as contained in the Order of November 28, 1951, is contrary to Sections 9(b) and 27 of the Federal Power Act and such Finding is arbitrary, capricious and an abuse of discretion by the Commission.

Insofar as the Order of November 28, 1951, permits the building of these dams in derogation of positive state laws, such Order constitutes a denial of due process of law and is in contravention of the Constitution of the United States. In no event can the City of Tacoma as a municipal corporation be licensed by the Federal Power Commission so as to proceed in violation of the laws of the State of Washington.

The basic Findings and Conclusions contained in the Order of November 28, 1951, and which pur-

ported to sustain said Order, are not supported by substantial evidence and the Commission has exceeded the power conferred upon it, has not fulfilled the obligation imposed upon it by Section 10(a) of the Federal Power Act and upon the entire record has acted arbitrarily and capriciously.

Finding No. 59 of the Order of November 28, 1951, is at complete variance with other Findings, operates to destroy the established comprehensive plan of the Lower Columbia River Basin area and its integrated Lower Columbia River Fishery Plan and constitutes an unlawful extension of the power conferred upon the Commission by the Federal Power Act.

The Findings and Conclusions of the Commission relating to the power situation in the Pacific Northwest are not supported by substantial evidence insofar as they indicate that there will be a severe power shortage in that region for the next seven to ten years which will not be alleviated by the federal program of constructions. There is no substantial evidence that the construction of these dams by the City of Tacoma will materially alleviate any power shortage and, in fact, the record indicates that there are alternate sources of power that will supply the same energy capable of being produced by these dams.

The record is devoid of substantial evidence that the project proposed by the City of Tacoma

is in any wise necessary in the interest of national defense.

There is no substantial evidence that the benefits to be derived from these dams outweigh the fisheries values and all other considerations.

There is no substantial evidence in the record to support the several Findings and Conclusions in the Order of November 28, 1951, that the fish runs in the Cowlitz River will not be substantially destroyed by these dams or that any portion thereof can be saved by the city's proposed conservation practices and facilities. The evidence in the record is overwhelmingly contrary to the Commission's Findings in these respects.

The Order of November 28, 1951, does not provide for adequate testing of fish protective devices, nor for determination of their effectiveness prior to their inclusion in the dam structures. The Order provides for the management of a state resource by a municipality, acting under the direction of the Commission, and purports to provide for further essential proceedings without opportunity for Petitioners to be heard.

For the foregoing reasons the Order of the Commission, issued on November 28, 1951, should be set aside and the cause remanded to the Commission for further action consistent with the determination of this Court.

ARGUMENT

We have divided our argument into three principal parts designated A, B and C with sub-heads, each covering a particular phase of the controversy under which parts and sub-heads our specifications of errors are grouped and discussed.

A.

THE FEDERAL POWER COMMISSION WAS WITHOUT JURISDICTION AND LEGAL AUTHORITY TO ENTER ITS ORDER OF NOVEMBER 28, 1951, AND TO ISSUE A LICENSE TO THE CITY OF TACOMA.

Specification of errors 1 through 5 are considered hereunder.

1. The City of Tacoma Has Not Complied with Applicable Laws of the State of Washington and Therefore Cannot Be Issued a License to Build These Proposed Dams Upon the Cowlitz River.

Although the statement of the case relates more in detail the factual background of this appeal, we here point out that:

The large and extensive anadromous fish runs, now present and utilizing the Cowlitz River, are the property of all of the people of the State of Washington and will be substantially and permanently impaired or destroyed by the construction of the contemplated dams. In protection of the fishery resources and water within the State, the legislature of the State of Washington, as a condition precedent to the construction of power dams and the utilizing

of water for power, has required the issuance of a hydraulic permit and that plans and specifications for the proper protection of fish life be approved by the Director of Fisheries and the Director of Game of the State of Washington. None of these steps has been complied with by the City of Tacoma.

In 1949, the State Legislature passed what is known as the "Sanctuary Act," hereinafter set forth, reserving the streams and rivers tributary to the Columbia River and down stream from McNary Dam as an anadromous fish sanctuary for the preservation and development of the food and game resources of the said river system. This statute not only prohibits the building of any dam more than twenty-five feet high on the Cowlitz River, but prohibits the diversion of the waters of said river under certain conditions, and provides that the Director of Fisheries and the Director of Game shall acquire and abate any dam or obstruction, or acquire any water right which may become vested on any stream or river within the aforesaid sanctuary, and which may be in conflict with the provisions of the Sanctuary Act.

In disregard of the State laws, and in effort to circumvent said laws, the City of Tacoma has now procured a license from the Federal Power Commission (Appx. A) to construct the two proposed dams.

The several State statutes which are pertinent are as follows:

The Columbia River Sanctuary Act is contained in Chapter 9, Section 1 of the Laws of 1949. It appears in Volume 5 of R.C.W. as Section 75.20.010, and is as follows:

> "All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five feet that may be located within the migration range of any anadromous fish as jointly determined by the director of fisheries and the director of game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: *Provided,* That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the director of fisheries and director of game."

The related statutory enactment requiring the acquisition and abatement of dams within the Columbia River Fish Sanctuary is found in Chapter 9, Section 2 of the Laws of 1949, and appears in Volume 5, R.C.W., as Section 75.20.020. It is as follows:

"The director of fisheries and the director of game, shall acquire and abate any dam or other obstruction, or acquire any water right which may become vested on any streams or rivers tributary to the Columbia River downstream from McNary Dam which may be in conflict with the provisions of RCW 75.20.010. Any condemnation action necessary under the provisions of this section shall be instituted under the provisions of chapter 120, Laws of 1947, and in the manner provided for the acquisition of property for public use of the state."

One of the statutory provisions relating to the necessity of securing a permit from the State Supervisor of Hydraulics, prior to the diversion of water, is found in Chapter 112, Section 46, Laws of 1949, and appears in Volume 5, R.C.W. as Section 75.20.-050. It is as follows:

"It is hereby declared to be the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

"The supervisor of hydraulics shall give the director of fisheries and the director of game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the director of fisheries and director of game shall have thirty days after receiving such notice in which to state their objections to the application, and the permit shall not be issued until such thirty days period has elapsed.

"The supervisor of hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion of the director of fisheries or director of game, such permit might result in lowering the flow

of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

"The provisions of this section shall in no way affect existing water rights."

Written approval of the State Directors of Fisheries and Game as to the plans and specifications for the proper protection of the fish life in connection with the construction of hydraulic projects is required by Chapter 112, Section 49, Laws of 1949. It appears in Volume 5, R.C.W., as Section 75.20.100 and is as follows:

"In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct, or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the department of fisheries and the department of game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence, and shall secure the written approval of the director of fisheries and director of game as to the adequacy of the means outlined for the protection of fish life in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency commences construction on any such works or projects without first providing plans and specifications subject to the approval of the director of fisheries and the director of game for the proper

protection of fish life in connection therewith and without first having obtained written approval of the director of fisheries and the director of game as to the adequacy of such plans and specifications submitted for the protection of fish life, he is guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this section and continues construction on any such work or projects without fully complying with the provisions hereof, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

"*Provided*, That in case of an emergency arising from weather or stream flow conditions the department of fisheries or department of game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications."

In addition to the foregoing statutes, other statutes relating specifically to the appropriation of water, requiring the issuance of a permit, and setting forth the procedure in relation to the same, were set forth in the Laws of 1917 as Chapter 117 and have been amended from time to time. These statutes, together with their present amendments, appear in Volume 6, R.C.W., as Chapter 90.20 and Sections 90.20.010 to 90.24.070, inclusive.

As stated above, the City of Tacoma, under the license in question granted by the Federal Power Commission, claims the right to proceed in violation of all of the above applicable laws of the State of Washington.

2. The Several Statutes of the State of Washington With Which the City of Tacoma Has Not Complied Are Valid Enactments Within the Exclusive Jurisdiction of the State Under Its Police Power.

Historically, the State of Washington has always been most concerned about the preservation of its fish and game, and this is particularly true with respect to the "Columbia salmon run."

As early as the territorial session laws of 1875 we find the passage of the following enactment:

> "Be it enacted by the Legislative Assembly of the Territory of Washington:
>
> "Section 1. That it shall be unlawful for any person or persons to use any seine, drag or gill net, or any other apparatus, during the months of March, April and May of each year, within the following limits, to-wit: Commencing at the head of Port Madison Bay in Section 4, township 25 north, range 2 East, following the northern shore of said bay to Agate Passage, thence following the shore line of Bainbridge Island, to Fletcher's Bay, in section 19, township 25, north, range 2 East; also all the shore line of Dogfish Bay. Any person violating the provision of this section may be fined in any sum not exceeding one hundred dollars, by any court having jurisdiction of the offense.
>
> "Section 2. Any person or persons who may build any dam of any kind, or place any obstruction of any kind for any purpose whatever, in any of the rivers of Washington Territory, frequented by salmon for the purpose of spawning, shall construct a suitable fishway by which said fish may reach the water above said dam, or obstruction; and it shall be unlawful for any person or persons to close any river of this Territory by placing across the

same any stakes, seins, drag or gill nets, which may prove an absolute bar to the passage of fish frequenting the same for the purpose of spawning. Any persons violating the provisions of this section may be fined in any sum not exceeding five hundred dollars ($500) to which may be added imprisonment in the county jail not exceeding one year.

"Section 3. This act to take effect and be in force from and after its passage." (Approved Nov. 5, 1875.)

November 8th, 1877, the territorial legislature approved another and more extensive act, entitled "An act regulating salmon Fisheries on the waters of the Columbia River." The preamble of this act clearly shows that the matter of preserving the runs of anadromous fish life was a matter of grave concern at this early date, which preamble reads:

"Whereas, It is well known that the salmon of the Columbia River and tributaries are rapidly diminishing in numbers to the injury of the public, and threatening if not averted to materially prejudice the interests of trade and commerce, therefore:"

This latter act, with minor modifications, was re-enacted by the first state legislature in 1889. At this time was also enacted the first chapter of administrative law as it applied to fisheries in this State (Chapter VIII Commissions, Session Laws 1889-90, page 233) wherein a Fish Commissioner was provided for, to be appointed by the Governor, and to such commissioner was delegated certain express powers, (1) to appoint and remove deputies, (2) to select and purchase suitable land, and build, operate

and manage fish hatcheries thereon, and (3) to examine any complaints and abate nuisances.

By the session laws of 1892, section 8 of the laws of 1890 was amended to provide that the Fish Commissioner would determine and approve any ladder to be built in connection with any dam or obstruction then in existence, or thereafter to be built.

Thus it will be seen that, from the earliest territorial days of Washington, the importance of preserving the run of anadromous fish through legislation preserving inviolate their spawning grounds has been foremost in the minds of our legislators.

The state *"Sanctuary Act"* does not purport to deal in a contradictory manner with anything expressed or reasonably implied in the United States Constitution, or to be found in any lawful enactment of the National Congress in support thereof. At best, the argument seems to be that the state *"Sanctuary Act"* is in derogation of the *ruling* of the Federal Power Commission, hence that the *ruling* of the Federal Power Commission must, under the Constitution, be the supreme law of the land. With this we cannot agree, nor, as we will show in later discussion, does the Federal Power Act purport to invade the province of the State of Washington in dealing with the matters covered in the state *"Sanctuary Act."*

Furthermore, as will be discussed at a later point in this brief in some detail, the City of Tacoma has no rights as a person under the Federal constitu-

tion, the City being merely a creature of the State of Washington, a political sub-division in fact of the State, and dependent entirely upon the will of the State legislature for its very existence as well as its rights and powers.

The wording contained in the title of the State "*Sanctuary Act*," in Section 1 thereof, and in the balance of the act as well, clearly establishes that this act is one for the protection of fish life in public waters of the State and the creation of a sanctuary for such fish life.

Such being the purpose, the act is one of, and well within, the police power of the State.

In *State v. Towessnute*, 89 Wash. 479, 154 Pac. 805, it is stated:

> "* * * The police power is not confined to subjects of safety, but extends to those of convenience and prosperity. *Chicago, B & Q. R. Co. v. Drainage Com'rs.* 200 U. S. 561, 592. It undoubtedly extends to the conservation of fish. *Smith v. Maryland*, 18 How. 71. Nor is it given up, nor can it be given up, by any legislature to the national government. It must be exerted, to be sure, in such manner as will not infringe other rights which the states, by the constitution, gave up to the central authority; but in controversies on this point the Federal decisions clearly resolve every doubt in favor of the local law. Indeed, even on a subject within the exclusive rights of the general government, the state laws of police will be upheld until the Federal law has actually been extended to that subject. *Sligh v. Kirkwood, supra.*"

State ex rel. Campbell v. Case, 182 Wash. 334, 47 P. (2d) 24, contains the following:

"The supreme court of the United States, in *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, quotes with approval, as follows, from *Magner v. People*, 97 Ill. 320, 333:

" ' "So far as we are aware, it has never been judicially denied that the government under its police powers may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older states since the organization of the Federal Government. * * * The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as in the opinions of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or implied by the sovereign authority—not a right inherent in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the State, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State. But in any view, the question of individual enjoyment is one of public policy and not of private right," ' "

To the same effect are: *State v. Tice*, 69 Wash. 403, 125 Pac. 168; *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938; *Graves v. Dunlap*, 87 Wash. 648, 152 Pac. 532; *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15; *McMillan v. Sims*, 129 Wash. 516, 225 Pac. 240; 132 Wash. 265, 231 Pac. 943; *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P. (2d) 24; *State v. Nelson*, 146 Wash. 17, 261 Pac. 796; *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P. (2d) 1101; *Cook v. State*, 192 Wash. 602, 74 P. (2d) 199; *State v. Tulee*, 7 Wn. (2d) 124, 109 P. (2d) 280.

Quotations of similar import to those above set out from the *State v. Towessnute* and *State ex rel. Campbell* cases could be here set forth from almost every one of the cases immediately above mentioned. However, we deem it proper not to belabor the point so conclusively decided.

That the Supreme Court of the United States adheres to the same view as the Washington State Supreme Court is clear from the following:

See *Skiriotes v. Florida*, 313 U. S. 69, 85 L. Ed. 1193; *Lacoste v. Dept. of Conservation of Louisiana*, 263 U. S. 545, 68 L. Ed. 437; *Johnson v. Haydel*, 278 U. S. 16, 73 L. Ed. 155; *Foster Fountain Packing Co. v. Haydel*, 278 U. S. 16, 73 L. Ed. 155, *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385; *Holyoke Water Power Co. v. Lyman*, 82 U. S. 500, 21 L. Ed. 133.

Many other cases from the Supreme Court of the United States of similar holding could be here cited.

Under the decisions it is quite apparent that Chapter 9, Laws of 1949, the state "*Sanctuary Act*," is an act within the police power of the state.

The power to regulate their fisheries was not among the powers delegated by the states to the Federal Government. This authority is reserved for the exclusive use of the states.

This principle was recognized in the early leading case of *McCready v. Virginia*, 94 U. S. 291; 24 L. Ed. 298; where the court said:

> "In like manner the state owns the tide-water themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people and the sovereignty is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which with respect to inter-state or foreign commerce, has been granted to the United States. *There has been, however, no such grant of power over the fisheries, they remain exclusively under the control of the state* * * *" (Emphasis supplied).

The Washington supreme court followed this rule in *Davis v. Olsen*, 128 Wash. 393, 222 Pac. 891, where it said:

> "The Federal Govt. may prohibit or give its assent to the maintenance of fixed structures in navigable waters, but it does not assume to give any right to take fish from even navigable waters against the will of the state."

The rule is likewise set out in 22 Am. Jur., page 695, as follows:

> "Within the boundaries of a state, the federal govt. has no authority over fisheries; the fisheries belong to the state in trust for its people. The regulation of fisheries is not a regulation of commerce and is not one of the powers given by the states to the United States."

It is thus apparent that the State, and the State only, has a right and duty to enact such measures as it deems necessary to protect its fisheries.

In *Holyoke Water Power Co. v. Lyman, supra,* the court had occasion to rule upon a statute of the State of Massachusetts very similar in nature to the statute in question here. There, the United States Supreme Court, in an exhaustive review of applicable decisions, affirms the rule that anyone who builds a dam across a stream so as to impede the migration of fish, does so under an implied obligation to maintain adequate fishways unless the charter permitting the construction of the dam specifically exempts them from such an obligation. The court recognizes the vital interest of the State in protecting fish inasmuch as the right to fish is vested in the State in trust for the residents of the State. The obligation to provide fishways does not depend on whether the stream is a navigable or a non-navigable one. It arises according to the court because of the interest of the public in its vital food supply.

The courts hold that such a requirement does not constitute a taking of property without due process of law since the obligation to provide fishways exists at the time of the construction of the dam,

Holyoke Water Power Company v. Lyman, supra, Staughton v. Baker, 4 Mass. 521, and *Parker v. State*, 111 Ill. 581, even in the absence of a statute declaring the obligation of the owner of the dam. It will be noted that the statute was enacted subsequent to the construction of the dam in the *Holyoke Water Power Company* case.

In *Parker v. State, supra*, there is an excellent treatment of the interest of the public in the fishing life, and also an excellent discussion to the effect that the right to maintain the dams without adequate fishways is not a right that can be acquired by prescription against the State. The court quotes with approval from *Staughton v. Baker, supra*, to this effect:

> "But the right to build a dam for the use of a mill was under several implied limitations. One was to protect the rights of the private owner by compelling him to make compensation to the owners of the land above—another was to protect the rights of the public to the fishing so that the dam must be constructed that the fish should not be interrupted in their progress up the river to cast their spawn. Therefor every owner of a water mill or dam holds it on the condition, or perhaps under the limitation that a sufficient and reasonable passage way shall be allowed for fish. The limitation being for the benefit of the public is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no laches can be imputed to the government and no time runs so as to bar its rights."

Thus the validity of R.C.W. 75.20.100 requiring approval of the state directors of fisheries and

game as to plans and specifications for proper protection of fish life in connection with construction of hydraulic projects cannot be questioned, nor can the power and duty of the State to promulgate it be questioned. It is admitted that the City of Tacoma has not complied with its terms.

The only question to be determined in this regard is whether the license granted by the respondent Federal Power Commission excuses the city from compliance with the provisions of R.C.W. 75.20.100.

It has already been determined that the State has authority to pass measures for the conservation of the fisheries within its borders and that the United States is without such jurisdiction. It is therefore obvious that the recitals in the Federal license with relation to fishery devices cannot relieve the city from the obligations of the State law.

Nor can it be said that, because the United States has a qualified jurisdiction over the navigable waters, the states' authority over the fisheries in these waters is in any way diminished. *Davis v. Olsen*, 128 Wash. 393, 222 Pac. 891; *McCready v. Virginia*, 94 U. S. 291; 24 L. Ed. 248. The fact is, as the courts state, the jurisdiction is co-existing, and that of one does not operate to the conclusion of the other.

Conceding, for argument purposes only, that a Federal license is valid, regardless of the state Sanctuary Act, the City of Tacoma would have no right to proceed without compliance with R.C.W.

75.20.100. The laws of the State must govern insofar as fish protective measures are concerned.

The obvious purpose of the Sanctuary Act is to reserve the use of the portions of streams in question and their spawning and feeding areas for anadromous fish. This constitutes a public use since, as we have already seen, the title to the fish is held by the State for the benefit of all of its people.

Thus these sections of State laws amount to a declaration by the State legislature of the use to which the waters in question shall be put and prohibit other uses which would interfere with this use. Section 27, of the Federal Power Act, clearly prohibits the respondent power commission from interfering with such determination of the State. The license therefore exceeds the authority of the Commission and is invalid.

3. The Several Statutes of the State of Washington Are Not Superseded by the Federal Power Act and Such Act Does Not Authorize the Granting of a License to the City of Tacoma.

The *Federal Power Act*, 16 U.S.C.A., 791a to 825r, does not purport to destroy the natural resources of any state or to confer upon the Federal Power Commission such authority; but, on the contrary, the Act expressly withholds such authority from the Commission and unequivocally states the intention of the Congress to be that such resources shall be managed and controlled by the laws of the respective states. The pertinent provisions of the Federal Power Act are:

In Subdivision 7 of Section 3, a Municipality is defined as follows:

> " 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;" 16 U.S.C.A. 796.

In Subdivision (c) of Section 4; the Commission is directed:

> "To cooperate with the executive departments and other agencies of State or National Governments in such investigations; * * *" 16 U.S.C.A. 797.

Subdivision (b) of Section 9 requires that each applicant for a license submit to the Commission:

> "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purpose of a license under this Act." 16 U.S.C.A. 802.

In Section 14, the right of condemnation is expressly preserved in this language:

> " * * * Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved." 16 U.S.C.A. 807.

In Section 21, the right of condemnation is given to a licensee in this language:

> "That when any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of other necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated:
>
> "PROVIDED, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." 16 U.S. C.A. 814.

Section 27 is a saving clause reserving certain rights to the states as follows:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U.S.C.A. 821.

The foregoing provisions, in most part, appeared in the original *Federal Water Power Act of 1920*, which was amended and supplemented in 1935, becoming Part I of the *Federal Power Act*. The following sections of Part II of said *Federal Power Act* are also indicative of the intention of Congress:

> "SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C.A. 824.
>
> "SECTION 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest * * * " 16 U.S.C.A. 824a.

We have shown elsewhere in this brief that the several statutes of the State of Washington relating to uses of water and the protection of its fishery are

clearly within the police power of the state. As a corollary to this, it is unquestioned law that the intention of Congress to exclude the states from the exercise of their police power must be clearly expressed and will not be implied. *International Union U.A.W. v. Wisconsin Employment Retirement Board*, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1147; *Allen-Bradley Local, etc., v. Wisconsin Employment Retirement Board*, 315 U. S. 740, 62 S. Ct. 82, 86 L. Ed. 1154; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 83 L. Ed. 500; *Carey v. South Dakota*, 250 U. S. 118, 39 S. Ct. 403, 63 L. Ed. 886; *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108.

This principle was recognized and considered in relation to the Federal Power Act by the Court of Appeals for the Second Circuit in 1942 in the case of *Hartford Electric Light Company v. Federal Power Commission*, 131 F. (2d) 953, wherein the court said:

> "We are not unmindful of the doctrine of such cases as *Federal Trade Commission v. Bunte Bros. Inc.*, 312 U. S. 349, 61 S. Ct. 580, 582, 85 L. Ed. 881; *Palmer v. Massachusetts* 308 U. S. 79, 83, 84, 60 S. Ct. 34, 84 L. Ed. 93; and *A. A. Kirschbaum v. Walling, administrator*, 316 U. S. 517, 62 S. Ct. 116, 86 L. Ed....., i.e., that, having 'due regard for a proper adjustment of the local and national interests in our federal scheme * * *', the Court should discountenance 'inroads by implication in state authority * * *' and that a Congressional intent to extend federal regulation should not be

assumed to exist unless Congress is 'reasonably explicit' in stating such a purpose."

The very language of the *Federal Power Act* negates any intention of Congress to exclude the states from the exercise of their police power, and, in fact expresses an exactly contrary intention.

Upon three occasions the Supreme Court of the United States has considered the intention of Congress as expressed in the *Federal Power Act* and in respect of the applicability of State laws.

In *Ford and Son v. Little Falls Fibre Co.*, 280 U. S. 369, 74 L. Ed. 489, decided in 1930, the Court said:

> "But, in the view we take of the application of the Federal Water Power Act to the present case, it is unnecessary to decide all the issues thus sharply raised. Whether the Commission acted within or without its jurisdiction in granting the license, and even though the rights which respondents here be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by State law, without compensation. Even though not immune from such destruction they are, nevertheless, an appropriate subject for legislative protection."

Citing cases, the Court then referred to Sections 10 (c), 27, 21 and 6 of the Act, and continued as follows:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters

> and the rights derived from these laws may be subordinate to the power of the national government to regulate commerce upon them, they, nevertheless, so restrict the operation of the entire Act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration * * *"

One of the most recent decisions interpreting the *Federal Power Act* is the case of *Grand River Dam Authority v. Grand-Hydro*, 335 U. S. 359, 93 L. Ed. 64, cited in 1948, wherein the Court said:

> "* * * As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the Court of Oklahoma in a condemnation action for the acquisition of land for power site purposes, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws."

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143 (1946), and which will be referred to at greater length in this brief, the Supreme Court referred in detail to the several provisions of the *Federal Power Act* and to its legislative history, specifically referring to Section 27 of the Act, as follows:

> "As indicated by Representative La Follette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitu-

tional rights of the states so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the state and Federal governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject.

"SECTIONS 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. It provides: 'Section 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.' 41 Stat. 1077, C. 285, 16 U.S.C.A. 1821, Sec. 821, 5 F.C.A. Title 16, Sec. 821."

In *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231, decided in July of 1950, there were involved actions against the United States to recover compensation for deprivation of riparian rights by reason of the construction of the Friant Dam in California. One of the issues before the Court involved the ascertainment of the intent of Congress, and the Court referred specifically to a section of the Reclamation Act substantially similar to Section 27 of the Federal Power Act. The language of the Court, including a footnote, is as follows:

"We cannot disagree with claimants' contention that in undertaking these Friant projects and implementing the work as carried for-

ward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. *Cf. State of Nebraska v. State of Wyoming*, 295 U. S. 40, 43, 55 S. Ct. 568, 569, 79 L. Ed. 1289; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 164, 55 S. Ct. 725, 731, 70 L. Ed. 1356; *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 614, 65 S. Ct. 1332, 1348, 89 L. Ed. 1815; *Mason Co. v. Tax Comm'n of State of Washington*, 302 U. S. 186, 58 S. Ct. 233, 82 L. Ed. 187. In this respect Congress' action parallels that in *Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483."

"The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. Section 371 et seq., 43 U.S.C.A. Section 371 et seq., to which Congress adverted, applies only to the seventeen Western States. Section 8 provides: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior. In carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof * * *' 43 U.S.C.A., Section 383. To the extent that it is applicable this

clearly leaves it to the State to say what rights of an appropriator or reparian owner may subsist along with any federal right."

The Washington State Supreme Court has had occasion to refer to the recognition in the *Federal Power Act* of the independence of the states from the domination or encroachment by the Federal Government. *State ex rel. Washington Water Power Co. v. Superior Court*, 34 Wn. (2d) 196 at page 204, 208 Pac. (2d) 849.

It is anticipated that respondent will rely upon the claimed authority of the *First Iowa Case* and also the case of *U. S. v. Appalachian Electric Light Co.*, 311 U. S. 377, 85 L. Ed. 243, 61 S. Ct. 291. Neither case is in point.

The *First Iowa Hydroelectric Coop. v. Federal Power Comm.*, 328 U. S. 152, 90 L. Ed. 1143, did not decide that the *Federal Power Act*, stemming from the commerce clause of the United States Constitution, could take precedence over the inherent right of a state to preserve and protect its fish in public waters of the state. On the contrary, the Supreme Court of the United States has almost without exception held that, except where repugnant to the U. S. Constitution, the police power of the states has never been conceded to the United States. *Pregg v. Commonwealth of Pennsylvania*, 41 U. S. 539, 10 L. Ed. 1060; *In re Slaughterhouse Cases*, 83 U. S. 36, 21 L. Ed. 394; *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285, 43 L. Ed. 702; *Bacon v. Walker*, 204 U. S. 311, 51 L. Ed. 499.

In the *First Iowa Case*, no question of the right of the state to legislate in protection of its natural resources was presented. The Iowa statute endowed the Executive Council of the state with the same power, the same duties and the same sphere of action as Congress has conferred upon the Federal Power Commission. To this extent, and to this extent alone, the Supreme Court held that the licensee did not have to comply with the state laws.

In the *Appalachian Case*, again the question of the preservation of a state resource was not involved. That case merely held that the licensing provisions of the Federal Power Act were applicable, even though the primary purpose of the dam was for the generation of electric power.

In the case at bar the purpose and nature of the several State Statutes are entirely different than any State laws considered in either the *First Iowa Case* or the *Apalachian Case*. The statutes of the State of Washington announce and set forth a State policy in respect of the diversion of water and the protection of its fishery resources.

The question at this point is not whether Congress could so legislate as to preclude the operation and effectiveness of the state laws under consideration, but whether Congress has so legislated. It is our position that Congress has not delegated to the Federal Power Commission authority to override the several State Statutes in question and, hence, permit the City of Tacoma to proceed in derogation of these State laws.

The conclusion above expressed is inescapable upon consideration of the entire Federal Power Act, including the sections previously set forth in this brief, and particularly is this true in relation to Section 27 of said Act.

The Supreme Court of the United States in the *First Iowa Case*, following the quotation set forth earlier herein, referred to said Section 27 in this wording:

> "Section 27 thus evidences the recognition of Congress of the need for a specific 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome.
>
> "Sections 27 and 9 (b) were both included in the original Federal Water Power Act in 1920 in their present form. The directness and clarity of Section 27 as a 'saving' clause and its location near the end of the Act emphasizes the distinction between its purpose and that of Section 9(b), which is included in Section 9 in the early part of the Act, which deals with the marshalling of information for the consideration of a new Federal license. In view of the use by Congress of such an adequate (identical) 'saving' clause in Section 27, its failure to use the same language in Section 9(b) is pursuasive that Section 9(b) should not be given the same effect as is given to Section 27.
>
> "The effect of Section 27, in protecting state laws from supersedure is limited to laws as to the control, appropriation, use, or distribution of water in irrigation in municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section under proprietary rights.

> There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. This was so held in an earlier decision by the district court relating to Section 27 and upholding the constitutionality of the Act, where it was stated that a proper construction of the Act requires that the words 'other uses' shall be construed *ejusdem generis* with the words 'irrigation' and 'municipal'. *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619."

In a footnote to the decision in the *First Iowa Case*, the Supreme Court refers to a Congressional debate upon the inclusion in another act of a section identical with Section 27. This reference, which appears in 51 Congressional Record 13630, is as follows:

> Mr. Mondell (Wyoming): "all that is asked of the Federal Government is to give those who seek to develop water power in the public land states an opportunity to use the public lands for that entirely legitimate and useful purpose
>
> . . .
>
> "Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public land states is a right received from the people of the state and not the Federal Government. The people of the commonwealth of the West are the owners and proprietors of all the water within their borders, and the only right that any individual can have or secure, at least in the majority of the public land states, is the right to use the water at a certain designated place for specific and useful purpose; and the right continues so long as at that place for that purpose those waters are

beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the western states that will carry with it the right to divert a drop of water or the use of a drop of water for the turning of a turbine. That right under the laws of the state, recognized by the Federal Constitution and the courts, must be secured from the people through the authority they have provided in the states. That right in all of the states is perpetual so long as the water shall be used at that place for that beneficial purpose."

The *Alabama Power Company Case*, a District Court decision cited by the Supreme Court in the *First Iowa Case*, held that the *Federal Water Power Act* was constitutional and in relation to section 27 stated the principle of *ejusdem generis* to be as follows:

"Now, coming to the consideration of the third objection raised by the respondents, involving the construction of Section 27 of the Act, supra, a proper construction of the Act requires that the words 'other uses' shall be construed *ejusdem generis* with the words 'irrigation' and 'municipal'. The rule is that, when in a statute general words follow a designation of particular subjects or classes, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation. In accordance with this rule, such terms as 'other' 'other things' 'others' or 'any other' when preceded by a specific enumeration, are commonly given a restricted meaning and limited to those things of the same nature as those previously described. 25 R. C. L. Sec. 240, 36 Cyc. 1119-1120."

This rule, however, as has been stated many times by the Supreme Court of the United States and also the Washington State Supreme Court, is but a rule of construction to aid in ascertaining the meaning of a legislative body, and is not for the purpose of subverting such intention when ascertained. *U. S. v. Mescall*, 215 U. S. 26, 30 S. Ct. 19, 54 L. Ed. 77; *Mid-Northern Oil Co. v. Walker*, 268 U. S. 45, 69 L. Ed. 841; *State v. Plastino*, 67 Wash. 374, 121 Pac. 851; *U. S. v. Alpers*, 338 U. S. 680, 94 L. Ed. 457.

Proper statutory construction requires that meaning be given each word and phrase in a legislative enactment. *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619; *Mason v. U. S.*, 260 U. S. 545, 67 L. Ed. 396.

Gooch v. United States, 297 U. S. 124, 80 L. Ed. 522, states:

> "The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to divert the obvious purpose of legislature."

With these general rules in mind, therefore, let us consider the general language of Section 27 of the Act here in question. It refers to state laws relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses. Obviously, the specific words used do not in any way exhaust the general description since

similar state laws may be invoked for many other purposes of the same general nature or character. This was expressly so held by the District Court in the *Alabama Power Company Case* which was cited with approval by the Supreme Court in the *First Iowa Case.* The *Albama Power Company Case* refers specifically to other State laws within the same particular subject matter, as follows:

> "Section 27, in its specific enumerations does not exhaust the particular subject matter, since state laws may be invoked for the following purposes, to wit, the construction of canals, or other artificial waterways, the construction of a drainage system, either to take fish from the navigable waters of the state, the rights of riparian owners with respect to the formation of ice on streams, the construction of wharfs, piers and docks, the right to shoot wild water fowls from boats under game laws, and perhaps others. These laws of the states are referred to and treated in the 27th volume of R. C. L., page 1061, along with the subjects of irrigation and municipal water supplies."

Each of the above types or classifications of state laws relates to legislation within the purview and scope of the police powers of the state as do laws relating to "irrigation" and "municipal uses." Each has to do with subjects, the regulation of which is a fundamental part of the sovereignty of the state and are of the *same nature* within the principle of *ejusdem generis.*

For example, the phrase "irrigation purposes" has been held by the Washington Supreme Court to be synonymous with, or at least included within, the

phrase "agricultural purposes." *State v. Tiffany*, 44 Wash. 602, 87 Pac. 932. "Municipal uses" have been held necessarily to include "agricultural purposes." *City and County of Denver v. Sheriff*, Colo. (1939), 96 Pac. (2d) 836. Each word, therefore, and certainly the word "irrigation," relates to the control, appropriation, use or distribution of water for the production of food. The use of the Cowlitz River for fish propagation is as much a use to produce a food crop as irrigation would be. A large share of the value of the State's fishery resources lies in their food value and it is impossible to distinguish in principle between the destruction of agricultural crops and the destruction of food crops. In point of fact, both the Washington Supreme Court and the Supreme Court of the United States have defined the police power of the State to regulate and control its fishery resources as within the sovereign power of the state to promote the general welfare by conserving and increasing useful and valuable food supplies. *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15; *State v. Van Vlack*, 101 Wash. 503, 172 Pac. 563; *Silz v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75; *Geer v. Connecticut*, 161 U. S. 519, 40 L. Ed. 793; *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385. See also the case of *Anthony v. Veatch*, a decision of the Supreme Court in Oregon, decided in 1950, 220 Pac. (2d) 493.

Certainly, upon principle and upon authority, the statutes of the State of Washington, set forth earlier in this brief, are laws relating to the control,

appropriation, use or distribution of water within the phrase "other uses" as contained in Section 27 of the Federal Power Act and in complete accord with the principle of *ejusdem generis.*

Furthermore, both the State Sanctuary Act, R.C.W. 75.20.010, and the State Water Code, R.C.W. 90.20.010 to 90.24.070, relate or refer to dams for power purposes. It is too well settled to require extensive citation of authority that the construction of power dams is a proper municipal purpose or power. *The City of Tacoma v. Nisqually Power Company,* 57 Wash. 420, 107 Pac. 199.

These State laws, therefore, relate directly and unequivocally to the control, appropriation, use or distribution of water used for municipal uses. Hence, they are squarely within the protection of Section 27 of the *Federal Power Act.*

Finally, an analysis of the *Federal Power Act* as a whole, and the Sections earlier set forth in particular, indicates clearly that Congress intended to accord to the several states the protection guaranteed them by the Fifth Amendment to the Constitution of the United States.

We have previously shown that the ownership of the fish within the waters of the State is in the people of the State. Likewise, the beds and banks of the Cowlitz River, including the spawning beds of the salmon within the river and its tributaries, are the property of the State. *First Iowa Case, supra, United States v. Cress,* 243 U. S. 316, 61 L. Ed. 746.

Respondent has not shown, nor could it show, that there are no other sources of power which would supply that expected to be produced by the Cowlitz dams. Hence, these particular dams are not even claimed to be essential to the well being of the City of Tacoma. Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of the Cowlitz fishery and to take for its own use the property of the State. This certainly amounts to a gross discrimination against the people of the State and such has been held to constitute a deprivation of property without due process, contrary to the Fifth Amendment. *Steward Machine Company v. Davis*, 301 U. S. 548, 81 L. Ed. 1279; *Currin v. Wallace*, 306 U. S. 1, 83 L. Ed. 441; *U. S. v. Petrillo*, 68 F. Supp. 845 (reversed on other grounds, 332 U. S. 1, 91 L. Ed. 1877).

The *Federal Power Act*, therefore, would be contrary to the Fifth Amendment if the Court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the State and without compensation therefor.

On the other hand, a cardinal principle of statutory construction requires, if possible, a construction in accord with the constitutionality of the statute in question, *Casco Co. v. P. U. D. No. 1*, 37 Wn. (2d)

777, 226 P. (2d) 235. It is logical, therefore, to conclude that Congress intended to preserve and protect those rights included within the protection of the Fifth Amendment. This is in keeping with the language of the entire Act and particularly Sections 21 and 27, previously set forth.

Aside from what rights Section 21 (providing for condemnation) provides in respect of the intent of Congress, it specifically accords to a licensee the right of condemnation. Respondent has not shown, nor could it show, that the City of Tacoma has availed itself of that right or acquired by condemnation any right to take or destroy the property of the State of Washington and its people. In and of itself this constitutes a complete bar to the right of the City of Tacoma to proceed further in the construction of these dams under any license of the Federal Power Commission.

The Court's attention is called to a very recent decision of the U. S. Court of Appeals for the District of Columbia handed down December 31, 1952. The case is entitled *Niagara-Mohawk Power Corporation v. Federal Power Commission*, and the decision has not yet appeared in the Reports. It is Docket No. 10,862, decided December 31, 1952. The decision held that State water-use rights remain valid and compensable when encompassed in a Federal licensed hydro-electric project, and that the Federal license is not the source of water rights, but a permission to exercise them pursuant to State law. The Court of

Appeals did not deny the long accepted proposition that Congress may exercise absolute power over the improvement of navigable streams. It held, however, that such authority was not necessarily exercised in the *Federal Power Act.*

In the leaflet-form copy of the opinion issued by the Court of Appeals, D. C. Circuit, in the *Niagara-Mohawk Power Corporation v. Federal Power Commission* case, the court stated, at page 29:

> "Moreover, the legislative history of the Act shows that Congress was taking care not to impinge upon the rights of states nor upon their rules of property concerning diversions of water."

At page 32, the said Court stated:

> "An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

At page 33, the said Court stated further:

> "We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; * * * that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; *that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law;* * * *" (Emphasis supplied).

4. The City of Tacoma as a Municipal Corporation Has No Rights Apart From the State of Washington, Nor in Derogation of State Laws, and Therefore the Said City

Cannot Be Licensed by the Federal Power Commission to Build These Dams.

This portion of the brief will be devoted solely to the proposition of whether a municipal corporation of the State of Washington is enabled to proceed under Federal authority in derogation of the state Sanctuary Act (Chapter 9, Laws of 1949) (Rem. Rev. Stat. 1949 Supp., Sec. 5944-2 *et seq.*) (R.C.W. 75.20.010 *et seq.*).

The State of Washington, under its police power, having enacted said Chapter 9, Laws of 1949, how can the Federal Power Commission authorize the City of Tacoma, a municipal corporation of this State, to proceed with construction of the dams in derogation of its state laws?

A municipal corporation is a mere creature of the State. *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Batchelor v. Madison Park Corporation*, 25 Wn. (2d) 907, 172 P. (2d) 268; *Hunter v. Pittsburg*, 207 U. S. 161, 52 L. Ed. 151; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 49 L. Ed. 591.

Municipal powers once delegated to the municipality by the State may be taken away from the municipality by the State. *Farwell v. City of Seattle*, 43 Wash. 141, 86 Pac. 217; *State ex rel. McMannis v. Superior Court for Whitman County*, 92 Wash. 360, 159 Pac. 383; *Pacific First Federal Svgs. & Loan Assn. v. Pierce County*, 27 Wn. (2d) 347, 178 P. (2d) 351; *Christie v. The Port of Olympia*, 27 Wn. (2d)

534, 179 P. (2d) 294; *Wheeler School District of Grant Co. v. Hawley*, 18 Wn. (2d) 37, 137 P. (2d) 1010; *Union High School District No. 1, Skagit County v. Taxpayers of Union High School Dist.*, 26 Wn. (2d) 1, 172 P. (2d) 591.

Since a fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, Chapter 9, Laws of 1949, cannot be read in any other light than to prohibit the building of dams in excess of 25 feet in height within the sanctuary. If the City of Tacoma ever had the power to proceed with the construction of dams on public waters of Washington to the destruction and elimination of fish life therein, that power has now been taken away by the State legislature, at least within the sanctuary outlined in the state Sanctuary Act.

It will be contended that regardless of state law the City of Tacoma may proceed under authority of the Federal statutes and constitution. In other words, although said city is a creature of Washington State, it may flaunt the authority of its sovereign to perpetuate its will under license of Federal authority, which brings us to the nub of this portion of the argument.

It may at this point be first helpful to observe some rules of almost universal acceptance which apply to municipal corporations.

1. Its sources of power include: (a) the State constitution; (b) the statutes of the State; (c) the charter; and (d) in some states the inherent right

of self government with respect to certain municipal matters. McQuillin—Municipal Corporations (1949), Vol. 2, page 578, Sec. 10.03. It is to be noted that Federal authority, constitution or otherwise, is not a source of power for a municipal corporation.

2. It is a general rule that municipal ordinances must be in harmony with State law, and where there is conflict the State statute prevails. McQuillin—Municipal Corporations (1949), Vol. 5, page 96, Sec. 15.20. See also same work, Vol. 2, page 592 *et seq.*, Sec. 10.09.

3. A general statute relating to matters of statewide concern ordinarily repeals, and is construed to repeal, previously existing ordinances in conflict with it, and ordinances enacted must not conflict with State law. McQuillin—Municipal Corporations (1949), Vol. 6, pages 246 *et seq.*, Sec. 21.34. See also same volume, page 391, Sec. 23.07.

In *Mosebar v. Moore*, 141 Washington Decisions 203 (September 25, 1952), the Supreme Court of the State of Washington said:

> "Appellant contends, that if the 1951 act is given this construction, it violates Art. XI, Sec. 10 of the state constitution, because it constitutes an improper attempt on the part of the legislature to interfere in the local affairs of a municipality acting under its municipal charter.
>
> "It is true that such charters
>
> ' * * * become the organic law thereof, and supersede any existing charter including amendments thereto, and all *special* laws inconsistent with such charter.' Washington

constitution—Art. XI, Sec. 10 (Italics ours).

"This constitutional provision, while providing for home rule within a city or town as to those matters which are local in character, does not give to the municipality, under its charter, the right to legislate exclusively on all matters which touch its existence. By authorizing municipal charters, the constitution does not take from the legislature the right to determine what shall be the law of the state, both inside and outside of municipalities.

"It is equally true that

' * * * cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution shall be subject to, and controlled by *general laws.*' Washington constitution—Art. XI, Sec. 10 (Italics ours).

"The law here in question (R.C.W. 35.21.-200), as we have pointed out, is a general law and applies equally to all persons within a given class. It affects not only the civil service employees of Yakima but also the civil service employees of every other city or municipal corporation within the state. It follows then that Art. XI, Sec. 10 of the constitution, is not violated by the statute, for city charters are specifically made subject to and controlled by such general laws."

The Federal Constitution has seldom been held to protect municipal corporations from legislative interference. It has been said that a municipal corporation has no privileges or immunities under the Federal Constitution which it may invoke against State legislation affecting it. McQuillin—Municipal Corporations (1949) Vol. 2, page 37, Sec. 4.17.

In *Williams v. Mayor of Baltimore*, 289 U. S. 36, 77 L. Ed. 1015, the Supreme Court of the United States says:

> "A municipal corporation, created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. *Trenton v. New Jersey*, 262 U. S. 182; *Newark v. New Jersey*, 262 U. S. 192; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539; *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Risty v. Chicago R. I. & P. Ry. Co.*, 270 U. S. 378, 390; *Railroad Commission v. Los Angeles Ry. Corp.*, 280 U. S. 145, 156."

In the *Trenton v. New Jersey* case above cited the Supreme Court stated:

> "The power of the State, unrestrained by the contract clause of the Fourteenth Amendment, over the rights and property of cities held and used 'for governmental purposes' cannot be questioned * * * *Hunter v. Pittsburg*, 207 U. S. 161, 52 L. Ed. 151."

It is clearly pointed out in 36 Michigan Law Review 385 that a municipal corporation has no rights under the Federal constitution, regardless of whether its governmental or proprietary rights are involved under the State statute in question. This article contains a complete and exhaustive analysis of the various cases which we will not here reiterate for sake of brevity.

We quote from a portion of the concluding paragraph of said article at page 396 of said 36 Michigan Law Review:

> "These recent decisions and opinions of the court seem to constitute adequate ground for discarding any lingering doubts, created by dicta in earlier cases, regarding the soundness of an assertion to the effect that the contract, due process and equal protection clauses of the national constitution afford no protection whatever to municipal corporations in their own right, as against the power of the states to control them. * * *"

The question is annotated at 116 A. L. R. 1037, *et seq.*, at the end of which annotation it is pointed out that the constitutionality of a legislative act can be attacked only by one who has an interest in the question and whose rights are affected thereby. It logically follows that the City of Tacoma has no rights apart from the State of Washington and, regardless of the constitutionality of the state law, if the building of the dams is prohibited thereby, the said city cannot proceed under license of the Federal Power Commission, nor be so licensed by said Commission.

We submit that the applicable statutes of Washington above set out are constitutional, they are in protection and preservation of the fishery resource of the State and all of its people under the sovereign police power. These State laws are not superseded by the Federal Power Act and the Federal Power Commission is without jurisdictioin or legal authority to license the City of Tacoma to proceed in violation of the laws of the State of Washington.

B.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BASIC FINDINGS AND CONCLUSIONS IN THE ORDER OF NOVEMBER 28, 1951.

We respectfully submit that the matters set forth in the first subdivision of this brief and incorporating specifications of error 1 to 5, inclusive, are determinative of all matters involved in this petition for review. In addition, however, the basic findings and conclusions embodied in the Order of November 28, 1951, are not supported by substantial evidence and this is a proper subject of review.

Section 313 (b) of the Federal Power Act provides, " * * * The Finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

It is too well established to require lengthy citations of authorities that the Court of Appeals will review an order of the Federal Power Commission on a challenge that it is not supported by substantial evidence. This Court expressly so held in the case of *Pacific Power and Light Company v. Federal Power Commission*, 98 F. (2d) 835; affirmed upon certiorari being granted by the Supreme Court of the United States, 307 U. S. 156, 83 L. Ed. 1180; and upon remand to this Court, the order of the Federal Power Commission was set aside, 111 F. (2d) 1014.

See also the following cases in this Court, where review was had, even though the Order was ulti-

mately affirmed, *North West Electric Company v. Federal Power Commission*, 125 F. (2d) 882, *Montana Power Company v. Federal Power Commission*, 112 F. (2d) 371.

It is well settled that the Court will examine the findings and evidence in such a review proceeding. *Carolina Aluminum Company v. Federal Power Commission*, 97 F. (2d) 435.

Specification of errors 6 through 17 are considered hereunder.

1. The Commission Has Exceeded the Power Conferred Upon It and Has Not Fulfilled the Obligation Imposed Upon It by Section 10(a) of the Federal Power Act, and Upon the Entire Record Has Acted Arbitrarily and Capriciously.

The Commission in the making of Finding No. 59 apparently took the view that, since the United States Army Engineers did not propose Federal development of the Cowlitz River, the river was not, in fact, included as a part of the Lower Columbia River Fisheries Plan. The Commission states in effect that there has never been any determination as to whether the Cowlitz River is a part of the said plan (see pages 4 and 5 of the Commission's Opinion, Appx. A), principally because the City of Tacoma had never made any application to develop the Cowlitz River for power prior to the formulation of the plan.

We submit as obvious that, in the making of a comprehensive plan for the development of waterways for all available public use, including power, commercial fishing and recreation, the identity of

the prospective developer is of no consequence. In other words, if such a plan is to be formulated and adopted, it makes no difference whatsoever whether Federal agencies, State agencies or private interests are involved as potential developers of the waterways.

The only evidence produced in the record in this case concerning the comprehensive plan for the development of the waterways in the Columbia Basin area was that of these petitioners, as intervenors in such proceedings.

The record as so made conclusively shows that the Columbia River and its tributaries has been extensively studied and analyzed by the United States Corps of Army Engineers, United States Bureau of Reclamation, Bonneville Power Administration and agencies of the several Columbia Basin states. See H. Doc. 531, 81st Cong. 2nd Sess. The Columbia was also the subject of consideration in the public report of the President's Water Resources Policy Commission (Vol. 2, Ten Rivers in America's Future). (Tr. 189-195.)

The record shows that all Federal and all State agencies have approved and adopted the Lower Columbia River Fisheries Plan as an integral part of the comprehensive plan for the development of the waterways involved (Tr. 104-106). Simply stated, the plans are for the maximum utilization of the Lower Columbia and tributaries entering the river below Bonneville for the management and

development of migratory fish runs primarily, and the utilization of the portions of the Columbia above Bonneville primarily for power. (See "Transaction of the American Fisheries Society, 1950 Reprint.")

The Cowlitz is one of the major salmon producing tributaries of the entire Columbia River. It is also the only major river which has retained most of its stream system unobstructed by manmade waterway developments. See Review Report on Columbia River and Tributaries, H. Doc. 531, 81st Cong. 2nd Sess., Appendix P. Further, the Cowlitz is the most important salmon producing tributary entering the Columbia below Bonneville Dam. Mr. Barnaby of the United States Fish and Wildlife Service testified that the Cowlitz was the "keystone" of the Lower Columbia River Fisheries Plan, and that in his opinion the success of the plan was dependent upon maintaining the Cowlitz in at least its present level of fish productivity. The necessity of preservation of the Cowlitz for fish runs will constantly be increased many times as the Columbia above Bonneville and the Snake River entering the Columbia above Bonneville are further utilized for power in accordance with the over-all comprehensive plan for the Columbia Basin area.

The Review Report on Columbia River and Tributaries, containing the Lower Columbia River Fisheries Plan, was approved and confirmed by this Federal Power Commission, and Congress, although it has not officially approved the entire plan because

of pending S. 1645, a bill to establish a Columbia Valley Authority, has appropriated $1,000,000 in 1949, $1,500,000 in 1950, and $2,500,000 in 1951, to the Department of Interior, to be expended by it with the States of Washington and Oregon in furtherance of the plan. A portion of the above mentioned appropriations has been expended upon the Cowlitz and other substantial portions of said appropriations have been earmarked for that river. Certainly this action on the part of Congress constitutes its approval of the Lower Columbia River Fisheries Plan as it relates to the Cowlitz, even though Congress has not officially approved the entire over-all comprehensive plan for the Basin.

The two States of Washington and Oregon have entered into a written agreement with the United States Fish and Wildlife Service whereby they, together with the said Service, will effect maximum development of the Lower Columbia and the tributaries thereof entering the river below Bonneville as a part of the comprehensive plan for the development of the waterways of the Basin. In furtherance of the plan, the State of Washington enacted into law the act known as the Lower Columbia River Sanctuary Act, Section 1, *et seq.*, Chapter 9, Laws of 1949, (Rem. Rev. Stat. 5944-2, 1949 Supp.).

In the making of its Finding No. 59, what comprehensive plan for the development of the waterways in the Columbia River Basin, referred to in said Finding, could have been in the minds of the

Commission? There is no evidence of any plan other than the comprehensive plan, including the Lower Columbia River Fisheries Plan, in the record. The Commission did not offer any plan of its own in its Findings, yet that is the ultimate effect of its decision, even though the Commission admitted that it did not have the necessary staff for making an independent evaluation of the water uses other than power when it approved the aforesaid Review Report (See Commission's Opinion Appx. A). The Commission staff offered no evidence in this record of any plan evolved by it.

Finding No. 59 is not supported by substantial evidence, and the Commission, therefore, has not complied with the mandate of Section 10 (a) of the Federal Power Act, which requires that the project will be best adapted to a comprehensive plan for improving or developing waterways for improvement of water power development and other beneficial public uses, including recreational purposes.

2. There Is No Substantial Evidence to Support the Several Findings and Conclusions Contained in the Opinion and Order of November 28, 1951 That There Is and Will Be a Severe Power Shortage in the Pacific Northwest for the Next Seven to Ten Years; That a Federal Program of Construction Will Not Alleviate That Condition; That Construction of the Dams as Proposed by the City of Tacoma Will Alleviate Any Power Shortage; That There Are Not Alternate Sources of Power That Will Supply the Same Energy Capable of Being Produced by These Proposed Dams; That the Project Proposed by the City Is Necessary in the Interest of National Defense; and That the Benefits to Be Derived

From These Dams Outweigh the Fisheries Values and All Other Considerations.

The fact that the existing power needs in the Pacific Northwest will not permit the immediate addition of large new loads does not support a Finding or Conclusion that there is a present severe power shortage.

Applicant, throughout its brief and argument, has placed an entirely unwarranted emphasis upon references in the record to a "critical water year," and by so doing has created a completely erroneous impression of the present power situation in the Pacific Northwest. This basic error is the foundation for all later Findings and Conclusions by the Commission.

Following the basic premise that there presently exists a severe power shortage in the Pacific Northwest, the Opinion and Findings of the Commission project that condition through the next seven to ten years. This second conclusion is equally without support in the record, notwithstanding some of the specific language contained in the Opinion and Findings is in accord with some testimony in the record.

The record contains various estimates of the relationship between firm power and potential requirements, ranging from those of the witness Robbins, who testified for Petitioners, as Interveners in such proceedings, to the estimate prepared by the Commission staff.

The record shows that there will be ample firm power with median water conditions, and considering all potential requirements of the entire region, by some time between 1954 and 1957. The various estimates as contained in the record are as follows:

Professor Robbins, 1954 to 1957 (Ex. 26)

Mr. McManus (Applicant's witness), 1955 to 1956 (Ex. 64 b.)

Applicant, 1956 to 1957 (Ex. 10—Plate 19)

F. P. C. Report on Jodsa Bill, 1957

The Commission staff estimates that there will not be power available until 1960, using as its criteria minimum water conditions.

Also, there is in the record, as Exhibit 23, the Bonneville Power Administration Advance Program for Defense 1950, which indicates in Charts 13 and 14 that power capabilities will exceed the potential requirements in this region in the event of a median water year by 1953 to 1954. This same report estimates that, in the event of a minimum water year, power capabilities will exceed potential requirements by 1957 to 1958 (Ex. 23, Charts 13 and 14).

It is possible, of course, to create new demands to the point where every river and stream and every other resource must be utilized. That point has not been reached, however, and certainly will not be reached during any period now foreseeable.

Throughout the entire record, in its briefs and in its oral argument, Applicant has sought to show that the proposed projects would be of material assis-

tance to the power situation in the Pacific Northwest. The record itself completely refutes this position.

Applicant's witnesses testified that the proposed plants could be placed in operation three years after authorization, and the Commission at Page 1 of its Opinion so found. Actually, however, this Finding and statement by the Commission conflicts with the very Order itself, and is contrary to the record, for Articles 28 and 30 of the Commission's Order indicate clearly that this is a five-year project. The Licensee is given two years to commence construction of the project, and three years thereafter to complete it.

Obviously, the two-year period is for the studies, tests and experiments relating to permanent fish ladders, fish traps or other fish handling devices, the submission of plans therefor, and the obtaining of Commission approval. As shown by Plates 31 and 32 of Exhibit 11, the installation and construction of fish ladders at Mossyrock would commence two months after the letting of the first contract, and at Mayfield four months after the letting of the first contract. This cannot be done until Article 30 is complied with and, hence, a five-year construction period is a distinct probability. We must assume that the Commission has directed Applicant to proceed as expeditiously as possible.

The project, therefore, could not be completed until at least 1957, and by that time the Federal Program will largely have met all potential power needs

in the Pacific Northwest. At the most, benefit to be derived from the Cowlitz dams would be of assistance for only a very short time.

On April 25, 1951, the Commission issued a license for the Yale Project which will have an initial installed capacity of 100,000 kilowatts, and provisions are made for another 100,000 kilowatts which the Commission can order to be installed concurrently with the first 100,000 kilowatts, if it so desires. (Tr. 111.)

This project is upon the Lewis River in the State of Washington, a river which is already obstructed by a high dam and to which there is no opposition from Interveners, Petitioners in these proceedings, legal or otherwise.

On May 2, 1951, the Commission ordered the installation of six 25,000 k.v.a. generating units at the Rock Island Project, which will produce approximately 135,000 kilowatts. (Tr. 111.)

These two projects, totaling a possible 335,000 kilowatts, can be constructed as quickly or more quickly than could the Cowlitz project and Finding No. 26 omits any reference thereto.

We have previously shown that there is no possibility of the Cowlitz Project being in operation by 1954 and, in fact, it will likely be 1958 to 1959 before power can be produced from that project. Hence, Finding 28 is in error.

The Findings of the Commission also omit any reference to proposed steam plants to be built by

other than Applicant. On October 9, 1951, the House of Representatives' Committee on Public Works reported favorably upon House Resolution No. 4963, which resolution proposes the construction, operation and maintenance of eight fuel fired electric generating plants by the Bonneville Power Administration in the Pacific Northwest. These plants would have a total capacity of 400,000 kilowatts (Report 1114, p. 1). The Secretary of Interior has estimated that these steam plants can be constructed and brought into operation at least two years earlier than any authorized hydro-electric plant, and that the gas turbine plants can be operated nine months earlier than the steam plants (Report 1114, p. 10).

The Court will, we believe, take judicial notice of this report of the Committee of Public Works report No. 1114, and the entire report is commended. Aside from the obvious facts appearing in the report, we believe it to be interesting on two additional grounds:

First, it is obvious from the report that the principal objection on the part of the minority members of the Committee on Public Works related to whether power in the Pacific Northwest should be furnished by the Federal Government or by private and local agencies (Report 1114, p. 17). We have no intention of becoming involved in that controversy, but, certainly, the protection of a vital state resource, as important to the economy of the State of Washington as its fishery industry, is of equal importance.

In passing, it should be noted that House Resolution No. 4963 has the support of the Department of Interior and the Federal Power Commission.

"National Defense" is a most difficult argument to oppose. Were the record to show, or the fact to be, that immediate construction of these two dams were essential to the defense of the United States, Interveners (Petitioners in the proceedings) would not be here opposing this application. But, such is not the case.

Certainly there is a national emergency, and certainly every one of us desires to do his part toward that emergency; but this is a far cry from saying that these dams are immediately necessary for national defense. There is nothing in the record that supports that conclusion. There is nothing in the record but unsupported, vague generalizations concerning national defense. The exact or even the probable course of the Korean conflict or the world conflict is unknown to all of us. If power is urgently needed, it can be supplied from other sources which will not damage a state resource. Upon this record, to state (as Applicant does and as the Commission does) that the construction of these dams (which could only be completed in from five to seven years) is immediately necessary for national defense, is to go beyond the record and to appeal not to facts, but to blind prejudice.

It would be far wiser to continue, if necessary, carrying some loads upon an interruptible basis,

(actual interruption is only for a few days or a few weeks at any one time) or to restrict the amount of power used by theater marquees, outdoor advertising, neon signs, taverns, hot dog stands, night football games, etc., than to destroy an essential industry in the name of "National Defense." We refer the Court to the Recommended Decision of the Presiding Examiner where he discusses the subject of national defense at pages 109 to 112, inclusive, of the transcript.

Section 10-a of the Federal Power Act provides that the projects shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a water way for the use or benefit of (1) Inter-state commerce; (2) Water Power development; (3) *Other beneficial uses, including recreational purposes.* (Italics ours.)

This, the Commission has not done, but, on the contrary, has measured the value of the power to be produced by the Cowlitz Project as the net value in excess of the cost of producing such power. Actually, the figure thus arrived at, to-wit, $1,700,000 per year, is the difference in cost found by the staff of producing power by the Cowlitz Project or by steam plants, which could be built by Applicant. We believe this figure to be too high, but, in any event, it is still not a proper criteria. Whether we consider this $1,700,000 as the sole benefit to be derived by Applicant or whether we look elsewhere in the record

to ascertain the net profit which Applicant will derive from the operation of these dams, that profit is, when considered as such, solely a gain to the City of Tacoma, while the destruction of the fishery resources means a loss to the entire State of Washington.

The Commission has entirely ignored the testimony of the only witnesses who testified specifically to the fisheries and recreational benefits. (Tr. 2854, Ex. 25, Ex. 30.)

In point of fact, the entire basis used by the Commission for the comparison of values is erroneous. As we have previously pointed out, this same amount of power can be produced through steam plants, whether built by Applicant, or by others; the Yale and Rock Island projects will supply substantially an equivalent amount of power; and the Federal hydro program will supply all potential needs. There can be no question but that each of these sources is economically feasible, and the cost to Applicant, therefore, is not material.

We are faced with the destruction of a state resource, and the true criteria for the comparison of values is the value of the fishery resource as compared with the value, to the region, of the power to be produced by this project. Applicant predicates its entire program upon the premise that the power to be produced by these dams can be marketed at six mills (Ex. 12, Tables 1 to 4). Other hydro or steam could certainly be marketed at the same rate (steam is currently marketed throughout the country at that

rate) and hence the Cowlitz power has no value to the region over and above power capable of being produced from other sources. The record is devoid of any evidence to the contrary.

As pointed out by the Presiding Examiner in his Recommended Decision (Tr. 139-143), the Commission staff, in its main brief in the Kern case, placed considerable reliance upon recreational benefits, evaluated in terms of "better living" for the people concerned. In the instant case, both the Commission staff and the Commission itself have ignored that concept.

This is apparently in justification of the minimum benefits which the Commission allots to both the commercial and recreational fishery, and has no support whatsoever in the record except in the Opinion and Order itself. We respectfully submit that the Commission itself, in the Opinion and Order in this case, has supplied the only evidence of forcing the full utilization of the Cowlitz River for power alone, and the consequent destruction of its valuable and irreplaceable fishery.

At the present time seventy per cent of the original natural spawning areas for anadromous fish in the Pacific Northwest has been destroyed forever (Ex. 39). The Cowlitz River is one of the two most important tributaries upon the Columbia River. The Columbia River fishery is a $20,000,000 industry and the Cowlitz constitutes at least ten per cent of that fishery (Tr. 1477-1488). If the Conserva-

tion Authorities cannot defend the Cowlitz River against construction of these dams, they cannot defend against loss of every other creek, stream or river in the entire Columbia Basin and the Puget Sound Region, and ultimately the fishery industry of the State of Washington will be completely destroyed. This is likewise true of the States of Oregon and California and the Territory of Alaska.

At the present time the Federal Power Commission and the City of Tacoma stand alone against the considered opinions and judgments of the States of Washington, Oregon, and California, the Director of Fisheries for the Territory of Alaska, every outstanding salmon fishery expert in North America, the Department of the Interior, the Army Engineers and the President's Water Resources Policy Commission.

In view of this, and upon consideration of the entire record, it is apparent that the Commission has acted arbitrarily and capriciously and has not exercised its judgment as required by Section 10-a of the Federal Power Act.

3. There Is No Substantial Evidence to Support the Several Findings and Conclusions in the Opinion and Order of November 28, 1951 That the Fish Runs in the Cowlitz River Will Not Be Substantially Destroyed by the Proposed Dams; That Any Substantial Portion of Such Fish Runs Can Be Saved If the Dams Are Constructed; That Any Substantial Benefit Will Be Derived From the City's Proposed Conservation Practices, Facilities and Improvement of Fish Habitat; and That Hatcheries Proposed by the City Can Be Constructed, Operated

and Maintained for the Cost Arrived at by the Commission; and the Commission's Values of Power Benefits and Fishery Resources.

No salmon fishery expert at the hearing held out any hope for the laddering system. The only witness who thought they might work was Dr. Hubbs, who admittedly has no experience in the management of a salmon resource or the design of fishways for salmonoids. Even he admitted there might be losses of sexually mature fish and recommended a program of further testing.

The highest existing dam over which salmonoids are being laddered is Bonneville, which has a height of 67 feet. (There is presently under construction ladder facilities at McNary Dam which will have a vertical ascent of 90 feet.) In this case we are faced with the problem of passing fish over a dam 185 feet in height and then over another 325 feet in height, with the problem made much more difficult because of the fact that the fish are greatly weakened by being in an advanced state of sexual maturity upon arriving at the dams (Ex. 30, p. 3). This problem is not present at Bonneville, nor is it present at McNary Dam (Tr. 3196-3198). It is known that a number of adult fish fail to locate the fishways at Bonneville Dam and that others fail to ascend it after entering it.

The fishery experts who have spent years planning the fish protective facilities at McNary Dam have doubts as to the eventual success of the facilities in passing the adult fish over the dams. The fishery

problem at both Bonneville and McNary Dam is simple compared with those presented by the proposed Cowlitz Project. It is no wonder that the fishery experts unanimously agree that there is little hope that the proposed laddering systems on the Cowlitz Dams will successfully pass the adult fish over the dams (Ex. 30, p. 3; Ex. 40, p. 4; Ex. 39, p. 9; Ex. 27, pp. 2-3; Ex. 35, p. 4).

Nowhere has the problem of collecting downstream migrants and passing them over or around dams been overcome. Here this extremely complex situation must be overcome twice. Since there will be no spill over the dams and the turbines will kill fish, a method must be found to get the downstream migrants past the dams, or it will be useless to get the adults on the spawning beds above the dams in the unlikely event that this proves possible.

While adult fish have been trapped and hauled around some dams and other obstructions with some degree of success, the problem has never been successfully solved under conditions that will prevail on the Cowlitz River. The only trapping and hauling operation that has been attempted on a stream of substantial volume was the Grand Coulee salvage operation performed in connection with the construction of the Grand Coulee Dam. Even though the fishery people were not there faced with a problem of maintaining fish racks in an uncontrolled stream, as they would be on the Cowlitz River during the construction period, and even though the Rock Island Dam pro-

vided an ideal situation for the trapping of the fish, the mortality of the fish trapped and hauled and their offspring ran as high as 70% in the Grand Coulee operation (Tr. 3619).

The trapping and hauling operation on the Cowlitz presents difficulties far beyond those encountered anywhere else where this method has been used. To begin with, until the dams are completed fish-tight racks would have to be maintained in the uncontrolled river where the stream flow could be expected to vary from about 1,000 cubic feet per second to over 40,000 feet per second, with a rise and fall of from 12 to 15 feet at the location of the rack. The best efforts of the Army Engineers and the Bureau of Reclamation have been unsuccessful to date in maintaining fishracks under much more favorable conditions (Ex. 35, pp. 3 and 4; Ex. 30, p. 3). No one would contend that a barrier could not be designed that would stay in the river. However, the problem is not that simple. The barrier must be capable of withstanding the flow of the river and passing the same, and at the same time present no opening large enough for the upstream migrants to pass through. Provision must also be made to keep the racks free of debris. This would constitute a major problem during the construction period. The City of Tacoma has offered no plans for these racks to date. We believe it is unreasonable to expect that, in the two years provided for in the Order prior to the commencement of the construction, the City of Tacoma

will find the answer to these problems which have so far baffled the Army Engineers, The Bureau of Reclamation and State and Federal fishery agents for many years (Ex. 30, p. 3; Ex. 35, pp. 3 and 4).

In the unlikely event suitable racks could be successfully constructed and maintained in the river, losses of upstream migrants will occur in many ways. Past experience tells us that many will fail to find and enter the trap; others will suffer injury and mortality in fighting the racks; still others will be so delayed in finding and entering the trap that they will spawn prematurely; more will be damaged by abrasion resulting from their handling during the trapping and hauling operations; some will find their way through the racks and perish against the dams, with the result that the mortality may well equal that experienced on the Grand Coulee salvage project. This, of course, would result in rendering these valuable runs of fish non-productive, even if the much more complex problem of handling the downstream migrants could be solved at this time (Ex. 35, pp. 2, 3 and 4; Ex. 27, pp. 2, 3, 4 and 5).

The Opinion of the Commission overlooks entirely the immense difficulty of screening the penstocks. As was stated in the record by a number of the experts with years of experience in these matters, screening devices on fish protective facilities present one of the most difficult problems encountered in the entire field. This arises principally from the difficulty in keeping such screen free of debris, for if

debris gathers on a portion of the screen, excessive velocities are created through the remainder of the screen, with the result that the fish are impigned on the screen by the pressure of the water, and perish. Because of this fact stationary screens have been largely discarded as impractical and are used only where there is a small volume of water to be screened, and the screens are located so that they may be readily and frequently cleaned. Otherwise, mechanically self-cleaning screens are used and considerable difficulty is still encountered in keeping them sufficiently clean. Here 3,000 cubic feet per second will pass through each screen. The screens themselves are stationary and will be submerged 200 feet. They will therefore be inaccessible for cleaning. Screens of the type in the proposed fingerling system have never been used elsewhere. All of the qualified experts were of the opinion that they will not work on the Mossyrock Dam (Ex. 35, p. 6; Ex. 27, p. 6; Ex. 35, p. 10; Ex. 30, p. 10). Their judgment is based upon their years of experience in attempting to maintain satisfactory screens under much more favorable conditions. They were likewise of the opinion that a substantial number of fingerlings would pass through the screen openings into the turbines where they would be decimated.

We do not believe that the tests conducted by the city and those conducted by the state are indicative of the results that can be expected at the Mossyrock Dam. Both tests were conducted in settled

reservoirs where debris is at a minimum. Even under those conditions the tests conducted by the state indicated the screens would need cleaning at least every three days. It is logical to expect that in a newly created reservoir there will be a much greater abundance of debris until the reservoir has been in existence a number of years and the debris has had a chance to settle to the bottom. The cleaning problem is complicated further by the fact that the Cowlitz is a glacial stream and carries a rather heavy burden of silt (Ex. 27, pp. 6 and 7).

It is difficult to imagine how the City of Tacoma's proposed screening apparatus can be tested short of a full scale experiment in a newly formed reservoir. If the screening method fails, as the experts unanimously believe it will, the runs of fish above the Cowlitz Dams will be destroyed through the destruction of the fingerlings in the turbines (Ex. 30, p. 5; Tr. p. 2522).

The proposed device for lowering the fingerlings from the reservoir through the dams into the tailwaters is completely revolutionary and untried in any respect.

Several of the experts believe that, even if the fingerlings enter the risers, they will leave through the first port they encounter because of their known tendency to resist the increasing pressure they will encounter if they are carried down the riser. Others believe they would be induced to leave the riser because of the attraction created by the light entering

the riser through the ports (Tr. 2121, 1837, 2883, 2882, 3242).

No one knows at this stage what currents must prevail in the risers to induce the fish to pass through the risers into the collection chamber (Tr. 2120, 2183). Unless a relatively slight current will accomplish this purpose the fingerlings will be impinged upon the screens in the collection chamber and perish (Tr. 2888, 2890).

At this stage no one knows how long the fish must remain in the collection chamber to become sufficiently decompressed prior to being released into atmospheric pressures, nor does anyone know what volume of water must be present in the collection chamber to accommodate the quantity of fish that might be present at one time and prevent their death by suffocation (Tr. 2883, 2121, 2122).

It is obvious that these immature fish will encounter conditions within this fingerling system completely different than those found in their normal environment. Experience has taught fishery experts that it is difficult, if not impossible, to predict the reaction of fish to environmental changes (Ex. 30, p. 6). It is therefore unreasonable to consider this as entirely an engineering problem, such as it would be if it were a case of transporting inanimate objects over or around an obstacle.

All of the salmon experts were of the unanimous opinion that the apparatus as presently designed,

or as it might be designed in view of our present knowledge of fishery problems, would fail to work. Many of the imponderables that remained to be determined have been set forth in preceding paragraphs.

Perhaps the most serious problem has not been mentioned. The experts who testified for the interveners (Petitioners in these proceedings) were of the opinion that, because of the small volume of water that would enter the ports and the low velocities that would prevail and the small areas of port openings, compared with the vast area of the face of the dam, few of the fingerlings, if any, would locate the ports and enter the risers (Tr. 2881, 2120, 3239). Those that failed to do so would become landlocked and perish. Whether they would find the openings or not is difficult indeed to determine short of full scale testing of the facilities over the life cycles of several runs of fish. Since the ratio of downstream migrants to returning adult fish often exceeds 100 to 1, it would be impossible immediately to determine what portion of the fingerlings were entering the ports and what portion remained in the vast reservoir behind the dams. The answer would only become apparent upon the return of the adult fish from that particular run (Tr. 2922). None of the fishery witnesses, including Dr. Hubbs, could suggest a means of determining this problem short of full scale testing over several life cycles of fish.

In this respect it should be kept in mind that the proposed fingerling systems are huge steel struc-

tures with many hundred feet of pipe and many valves, and that it will become an integral part of the concrete dam. Since no such device has ever been built, it will have to be custom made and ready for inclusion in the dam when the concrete is poured. Obviously working drawings of this device will have to be prepared at an early date if construction of the dams is to commence within two years of the date of the Order. It is difficult indeed to see how an adequate testing program to work out the many imponderables presented by this complex apparatus can be conducted in such a period. It is even more difficult to determine how substantial changes in the apparatus can be made after the same has been incorporated within the concrete dam and found to be unsuitable (Tr. 2142).

Even if the many complex fish protective devices can be made to work as well as the city hopes, there will be unavoidable losses at each which, in the accumulative, when added to the losses occurring in nature, would likely render these runs non-productive i.e., barely capable of maintaining themselves and not capable of producing fish for the fishery. Experience at the most simple and best designed fish passage facilities has proved that a number of fish always fail to negotiate them successfully. This is because it is impossible to predict how they will react to changes in their natural environment. Here a series of losses can be expected which, even if each were insignificant by itself, when added together

can be expected to reduce the runs to insignificance (Tr. 2999, 3000).

Substantial losses of adult fish can be expected at each of the racks, each of the ladders, in the Mossyrock fish locks, on the Mossyrock fish "chutes" and in the tank truck, if that method is used. Substantial losses of downstream migrants can be expected through the turbine screens, through the collection system screens, in the collection chamber from suffocation and premature decompression, from injury by adult fish in the ladders and in the collection system, from failure to find the port openings, etc. These losses plus the loss of 400,000 sq. yds. of valuable spawning area under the reservoirs will make it impossible to maintain production runs of fish in the Cowlitz River above the Mayfield Dam site (Ex. 35, p. 2; Tr. 2999, 3000).

In view of all of these considerations and the wealth of testimony given by the many expert witnesses produced by Interveners, Petitioner in these proceedings, it is abundantly clear that the runs of fish above the dams cannot be saved once the dams are in place. All of the experts experienced in salmon management and the design, maintenance and operation of salmon fish ways were unanimously of this opinion. Not one salmon expert could be produced who held any other view.

The record conclusively shows that, at the time when spawning fish are utilizing that portion of the Cowlitz River below the Mayfield damsite, the river

is in the process of increasing from its low in the summer to its high in the winter and that the hourly and daily fluctuations of river stages are substantially less than are permitted by this order. Since the river is increasing in volume, there is little danger that many spawning beds will become uncovered prior to the hatching of the fish. On the other hand, where hourly and daily fluctuations occur, such as are permitted in this Order, eggs deposited on shallow riffles could become uncovered with the result that the eggs would dry and perish. There is the further possibility that both ascending adults and descending fingerlings would become trapped on shallow riffles because of the sudden drop in river level. There is further indication that these artificial changes in river level are disturbing to upstream migrants and cause them to delay their journey to the spawning beds beyond their tolerance. Mr. McKernon, Mr. Barnaby, Dr. Van Cleve and Mr. Frye testified in detail on this problem. Their testimony was based not on speculation, but on actual observation of the damage that has been done downstream from other power installations in the Pacific Northwest. There is no reason to expect anything different on the Cowlitz River (Tr. 2901).

From the experience at the Aerial Dam on the Lewis River, it can be expected that the water temperatures of the Cowlitz River below the dams will at times be increased above the tolerance of salmonoid fish (Ex. 28, pages 29, 22, 23; Tr. 2181 and

2183). There will also be toxic changes in the chemical content of the water. These changes have been proved to be fatal to fish eggs (Ex. 28, pages 24, 25, 26, 27, 28). If such changes occur in the temperature and chemical content of the Cowlitz—and there is every reason to believe they will and none to believe they will not—all of the spawning area in the main stream below the dam will be ruined.

There is likewise nothing in the record to support the statement appearing in the Opinion (Tr. 530) that a benefit would be derived through the decrease of pollution because of increased low water flow. There could be no better proof of the absence of a pollution problem than the abundance of fish that presently utilize the river.

It should be stated that never in history has a major run of fish been maintained by hatcheries alone; even Dr. Hubbs knew of none. As is disclosed in Exhibit 25, and as was stated by Mr. Riddle (Tr. 3558-3559), hatcheries are used as a supplement to natural propagation and not as a substitute therefor. The extent to which they may be used is dependent to a very considerable extent upon the amount of food available to the fish in the natural river after they are hatched and released from the hatchery. There is little hope that the river system above the dams will be available for use by either adult or immature fish after the dams are in place, since the dams will be a complete barrier to both adults and fingerlings. The experts most familiar

with the river believe it is supporting as large a population at the present time as it is capable of unless more of the system can be made accessible to the fish. It is obvious, therefore, that the river system below the dam will not be able to accommodate substantial quantities of hatchery fish in addition to those already using this portion of the river.

The ability of the system to feed and maintain fingerling fish will also be greatly reduced because of the dams themselves. As was indicated in Dr. Van Cleve's testimony, after the fingerling fish emerge from the gravel they migrate rather freely and extensively over the river system in search of food during the time they spend in fresh water (Ex. 30, p. 9). These dams will, in effect, deprive them of the food contained in more than 50% of the river system. Even Dr. Hubbs does not claim that fingerlings can ascend the ladders or be trapped and hauled around the dams. It, therefore, is apparent that the lower half of the system will be less productive than it is in its natural condition, since the food supply available to the fingerlings hatched below the dams will be very materially decreased (Ex. 27, p. 4).

The only two known sites that are suitable for hatcheries on the Cowlitz River system are presently earmarked for development by the State of Washington under the Lower Columbia River Fisheries Program. Again it is difficult to see what contribution Applicant can make in this regard.

Ninety percent of the spring Chinooks spawn above the dams. These fish have an annual value of almost $200,000 and cannot be reared in hatcheries or in the warmer waters of the lower portions of the river (Ex. 28, pp. 6 and 7).

As the Examiner found in his Recommended Decision, the Applicant has so far made no proposal relative to conservation practices, facilities and improvements on the Cowlitz River watershed that are capable of being evaluated. Furthermore, the State of Washington and the United States Wildlife Service, after years of study of the watershed and its fishery resources, have determined upon a program that will increase the fish producing potential of the watershed even beyond its present high level. This program is now going forward as a part of the Lower Columbia River fisheries program. It is difficult indeed to conceive what contribution the City of Tacoma could add to the program now contemplated.

Without any supporting testimony appearing in the record the staff has assigned an arbitrary figure as the City's obligation in the way of providing hatchery facilities and making stream improvements. There was no testimony on the number of hatcheries that might be required or their probable cost, nor was there any evidence as to what stream improvement programs might be necessary and what they would entail in the way of cost. The figures were literally picked out of the air. The same is

true insofar as the annual cost of operating and maintaining the facilities is concerned. This same objection goes to the values arrived at in Findings No. 49, 50 and 51, which are additionally fallacious since a power value based upon an invalid comparison is used, as is set forth elsewhere in this petition.

C.

THE ORDER OF NOVEMBER 28, 1951, CONSTITUTES AN UNLAWFUL EXTENSION OF THE AUTHORITY OF THE COMMISSION UNDER THE FEDERAL POWER ACT IN THAT ITS SPECIFIC PROVISIONS DO NOT PROVIDE FOR THE DETERMINATION OR ADEQUATE TESTING OF THE EFFECTIVENESS OF THE FISH PROTECTIVE DEVICES; PROVIDES FOR THE MANAGEMENT OF STATE FISHERY RESOURCES BY THE CITY OF TACOMA; AND PURPORTS TO PROVIDE FOR FURTHER ESSENTIAL PROCEEDINGS WITHOUT OPPORTUNITY FOR PETITIONERS TO BE HEARD.

Specifications of Errors 18 through 20 are considered hereunder.

The laws of the State of Washington require that fish protective facilities installed on any hydroelectric project in the State be approved by the Director of Fisheries and the Director of Game, who head the two State conservation agencies charged with protecting the fishery resources, which are the sole property of the State, and in which the Federal Government has neither a property interest, nor the right to regulate in any manner. It is obvious, therefore, that even though this Commission might feel that it has the authority to license this project, it can do so only upon requiring the Applicant to pro-

vide fish protective facilities to the satisfaction of the State agencies. (The right of the City to proceed in derogation of State law is discussed elsewhere in this brief.)

The provision for further testing is also defective in that it provides no adequate safeguard. It gives the Commission the right ultimately to determine the adequacy of the fish protection facilities and does not require it in any way to be bound by the recommendations of the Secretary of the Interior. It is submitted that, while the Commission and its staff are expert in many fields, they are not suited by training or experience to be the ultimate judges of the effectiveness of fish protective facilities.

While the Secretary of the Interior indicated in his letter that he was hopeful that fish problems in connection with high dams would be solved some day, he certainly did not indicate that he believed the solution was at hand, or that it could be found within a period of two years, in connection with the Cowlitz dams, nor did he alter his position of being opposed to the dams because of their conflict with the Lower Columbia River fisheries program and the comprehensive plan for the development of the Columbia River Basin.

The Commission and Applicant recognize there are many uncertainties concerning critical parts of the facilities. The salmon fishery experts recognize there are many more, and acknowledge that they con-

stitute problems they have been unable to solve after many years of effort. By the terms of the Order the Applicant will be forced to conduct its tests and experiments in an atmosphere of haste and urgency so that construction can be commenced and completed according to the terms of the license. The test of the efficiency of any fish protective device is its ability to maintain a run of fish. It is not sufficient that it be capable of passing a portion of a run. It must be capable of maintaining the run at a productive level. Here the problem is magnified because there is a series of untried devices. They must all work satisfactorily or the runs will be lost. The effectiveness of such devices can only be determined after full scale testing over the life cycles of several runs of fish and even then it might not be possible to determine what part or parts of the devices failed. Ordinary prudence would require such testing before placing a valuable state resource at the mercy of such devices.

The Commission has found that Applicant has not sustained its burden of proof by producing plans which can presently be expected to save the fish. The decision is apparently based upon the *hope* that it will do so prior to commencing construction. However, no provision for the withdrawal of its license is made in event it fails to do so. It would seem that any applicant, who desires to undertake a project which will jeopardize a valuable State resource, should be required to prove that he has provided adequate protection for the resource before he is authorized to proceed.

In this regard it should be noted that the Commission's decision is predicated upon the proposition that it will be possible to have the power without "undue loss of the fishing resource." Since this is the case, Applicant should be required to prove the effectiveness of its program before commencing construction. Article 30 of the Order fails to require this. It leaves the Commission with authority to allow Applicant to proceed, even though the testing and experimentation might conclusively prove the devices will fail to save the runs. This would produce a situation completely inconsistent with the Commission's opinion, and one which apparently the Commission does not find to be in the public interest.

If the Commission intends that Applicant must install fish protective devices that have been proved to be reasonably successful, it should make such a condition in the license. On the other hand, if the Commission intends to allow the construction of the dams whether the facilities will work or not, that fact should be set forth in the order at the present time.

Many features of Applicant's proposed fish facilities are completely revolutionary and untried. Some are only theories and ideas. The Commission, and even Applicant, recognize the need for a program of testing and experimentation. It is likely that many changes in the plans will be made as the testing proceeds, just as Applicant has already changed numerous features of the various devices. Articles 30 and 31 of the Commission Order permit the Commission

to approve and adopt such plans without giving Interveners (Petitioners in these proceedings) an opportunity to be heard as to the probable effectiveness of the plans, in spite of the fact that a valuable State resource is in jeopardy. The inclusion of proper plans for the fish protective devices is an essential and important part of the application to obtain a license. Interveners (Petitioners in these proceedings) are entitled to participate fully in all matters material to the granting of a license. Articles 30 and 31 deny them this right.

In this regard, it is submitted that, since further planning is required, a license to construct is unauthorized until all plans have been approved.

The maintenance, propagation and management of fishery resources within the State of Washington is the sole and exclusive responsibility of the State. The Federal Government has no authority to intervene in any manner, and can do so only at the invitation of the State and to the extent permitted by the State, as is discussed in another portion of this brief. The effect of Article 31 is to permit the Commission first to determine how this resource shall be managed, and then place the responsibility of management upon a municipality to the total exclusion of the sovereignty of the State.

VI. CONCLUSION

Upon the entire record in this cause the Federal Power Commission has exceeded the jurisdiction conferred upon it by the Federal Power Act. The City of Tacoma cannot proceed in derogation of valid and positive state law. The basic Findings and Conclusions of the Commission are not supported by substantial evidence and the Order of the Commission is fatally defective in that its specific provisions do not make adequate provision for the protection of the state resources and deprive Petitioners of the opportunity of being further heard in regard to such resources.

We respectfully submit that the Orders of the Commission in this cause should be annulled and set aside and the said cause remanded to the Commission for further action consistent with the determination of this Court.

Respectfully submitted,

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WILLIAM E. HICKS,
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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of
CITY OF TACOMA, Washington } Project No. 2016

OPINION NO. 221

BY THE COMMISSION:

The City of Tacoma, a municipality in the State of Washington, on December 28, 1948 filed an application for a license under Section 4 (e) of the Federal Power Act for authority to construct, operate, and maintain the Mossyrock and Mayfield developments on the Cowlitz River in Lewis County, Washington, designated as Project No. 2016.

The Mossyrock dam would be located at about river mile 65 and the Mayfield dam at about river mile 52. The Mossyrock power plant would have an initial power installation of three generating units of 75,000 kilowatts each, with provision for a fourth unit of the same size. The initial installation at Mayfield would be three 40,000-kilowatt units with provision for a fourth unit of the same size, thus giving the two plants a combined capacity of 460,000 kilowatts. Thus, these two plants would add 190 per cent to the present capacity of the Tacoma generating plants and nearly 10 per cent to the present combined total installation of 4,700,000 kilowatts in the Pacific Northwest power pool. Three years would be re-

quired after authorization before the proposed plants could be placed in operation, this project being one of the most readily available sources of power in the Pacific Northwest.

Since the City of Tacoma's generating, transmission and distribution system is already interconnected with the other public and privately-owned power plants operating in the Pacific Northwest power pool, the addition of these sizable units west of the Cascade Mountains would be of benefit to all of the power consumers in the area, particularly as a diversity of rainfall on both sides of the Cascades would enable the City to firm up some of the other developments operating in the power pool, especially during the winter months when the power load is highest. In addition, these plants would be located within a relatively short transmission distance from Tacoma, Seattle and Portland, the heavy load centers in the area.

The severe power shortage in the Pacific Northwest is a matter of national concern, particularly when every effort is being made to increase the industrial output and the output of those materials calling for large blocks of low-cost power, and of course the principal increase in the power demands of the area has been due to the expanding defense requirements which must be met. Furthermore, the serious regional power shortage in this area will not be met by the planned Federal power construction, but additional generating plants must be built as

rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with maximum assistance to other power suppliers.

On the other hand, Section 10 (a) of the Federal Power Act requires that licenses shall be issued only for those power projects which in the judgment of the Commission are best adapted to comprehensive plans for full development of those streams subject to Federal jurisdiction and, of course, other benefits than power production may be secured by utilization of streams in their natural state or through improvements. The engineering possibility of realizing the anticipated power benefits from the proposal of the City is not to be seriously questioned, nor is it denied that large flood control and incidental navigation benefits would result. However, the Cowlitz River is extensively used for spawning by andromous fish, and the City is confronted by those who contend that this natural river use will be completely destroyed by the proposed dams.

The Mossyrock dam would be about 510 feet in height and the Mayfield dam about 240 feet in height, both above bedrock, and it is said that anadromous fish would be unable to reach the pools above the dams, particularly the higher of the two, during the spawning season, nor could the small fingerlings find their way downstream. Fish ladders having a vertical ascent of 65 feet are in operation at the Bonneville dam and the same facilities are planned at the Mc-

Nary dam just upstream to make possible an ascent of 92 feet, but no fish ladders over 200 feet in height have been installed at any other dam. Furthermore, it is said, the other fish handling facilities and conservation measures proposed by the City will not be effective and the present valuable fishery resources will be destroyed.

In addition to offering physical obstacles to fish passage upstream and downstream, the State Attorney General, the Department of Fisheries and Game, and the Washington State Sportsmen's Council, Inc., object to the proposed dams on legal grounds. They argue that the application should be denied because construction of any dam greater than 25 feet in height is forbidden by the State Columbia River Sanctuary Act in any tributary of the Columbia downstream from the McNary dam and within the migratory range of anadromous fish. We recognize, of course, that any State statute represents an expression of the intention of the Legislature by which it was enacted, but since we are dealing here with the applicability of a Federal statute it is equally clear that a State statute cannot stand as a complete legal bar to authorization of a State prohibited project if in the judgment of the Commission that project is best adapted to comprehensive plans and would be of unmistakable public benefit. We should not, merely in reliance upon the State Sanctuary Law, attempt to escape responsibility for considering the broader public interest questions before us under the Federal Power Act.

Another bar to approval of the application suggested by the interveners, and apparently relied upon by the Examiner, is the Columbia River Review Report submitted in 1948 by the United States Army Corps of Engineers. This is presented to us as a specific recommendation for indefinite postponement of any water-power development on the Cowlitz River because that river was included in the Lower Columbia Fisheries Plan prepared by the United States Fish and Wildlife Service in cooperation with the Fish and Game Commissions of the States of Washington, Oregon and Idaho, and because the Army Engineers were said to be of the opinion that the Cowlitz River was needed as a spawning area for fish and that there was an adequate supply of electric power available elsewhere in the Columbia Basin.

We note initially in this connection that while Congress has appropriated funds for certain of the developments included in the 1948 report it has not given its approval to the Lower Columbia Fisheries Plan nor to the basin plans of the Army Engineers. The current views of the Chief of Engineers were expressed in his report to this Commission under Section 4 (e) of the Federal Power Act on the application of the City of Tacoma for a license for Project No. 2016. In reporting to the Commission the Chief of Engineers says that no recommendation had been made in the Review Report for development of the Cowlitz sites because of the interest of local communities in undertaking such development and because of the need for correlation of power development by

local interests with the needs of preservation of the fishery resources. In other words, in 1948 the Chief of Engineers recognized the local interest of the City of Tacoma in development of the Cowlitz, which would render Federal investments unnecessary, and he was of the opinion that the power supply was then adequate. As we now see, the power supply is presently inadequate and the City of Tacoma desires to proceed.

The comments of the Commission upon the 1948 Review Report were, of course, directed principally to the power features of the plan there submitted. The Commission has neither the responsibility nor the necessary staff for making an independent evaluation of other uses than power in commenting upon such comprehensive plans of the Army Engineers as were submitted in 1948 and it made no attempt at that time to weigh the merits of the proposal of the United States Fish and Wildlife Service to postpone consideration of the development of those streams tributary to the lower Columbia River. Since the Army Engineers did not then propose Federal development of the Cowlitz River, the Commission was justified in taking the recommendations of the Fish and Wildlife Service at their face value. Upon the filing of the instant application, however, the responsibilities assigned to the Commission under the Federal Power Act made impossible any further postponement of consideration of the development of the Cowlitz River and required full and impartial

evaluation of the applicant's proposal on its merits and the objections thereto, including full opportunity to all Federal and State agencies in any way interested in the proposal to present their views and relevant information in support of their recommendations.

This leaves for discussion the claims of the applicant and of the fishery interests with respect to the fishery resources of the Cowlitz River upstream from the Mayfield dam, the effects reasonably to be anticipated from construction of the proposed dams, and the economic and public benefits under natural conditions and with the improvements proposed by the City.

Since the stream discharge below the Mayfield dam would be smoothed out seasonally to a substantial degree, there would not appear to be any jeopardy to the fish population below that dam if the construction proposed is undertaken. In fact, the evidence indicates that there may be an increase in those fishery resources. The daily power operations at Mayfield should be such as not to injure the fish, and we should reserve the right to consider this situation from time to time as occasion arises.

The important anadromous fish inhabiting the Cowlitz watershed are the spring chinook, fall chinook, silver salmon, the steelhead and cutthroat trout, and the smelt.

The salmonoids and the smelt perish after spawning while the sea-run trout spawn several

times before dying. Each race of the anadromous fish of Cowlitz River watershed utilize spawning areas suitable to its ecological niche and each has well defined migratory and spawning habits of its own. The anadromous fish use the fresh water of the Cowlitz River for spawning purposes and early rearing of the young, the greater portion of their growth and life being associated with the sea. Most of the anadromous fingerlings migrate to sea during the spring of the year. The effect of man-made changes and of pollution on the fish has been adverse to some degree. The reduction of pollution through increase in low water flow, as proposed by the applicant, should be beneficial.

The Examiner made certain findings as to the gross and net values of the fish using the Cowlitz River, and while there may be some question as to the actual values, we are adopting his findings for the purpose of our analysis, since the values which he adopted appear to be ample. Although the values assigned to the recreational aspects of the fishing may be in part conjectural, the commercial fishing values have a fairly substantial foundation. In any event, we are convinced that the Cowlitz is an important fishery stream in the Columbia River system and our inquiry into the possibility of loss of any portion of these natural resources has been upon the assumption that whatever the actual values may be, they are of material importance to the people of the area and should not be lightly brushed aside.

Although the sports fishery, constituting a form of recreation has been evaluated in monetary terms, a suggestion has been made that it may in addition have substantial intangible values. The fact that such recreation may have intangible values does not mean that they are large or significant and there is no basis for assuming that they outweigh the rather tangible and large flood control, navigation and power benefits which can result from the improvements proposed. In this particular region, as in many other sections of Washington and Oregon, there are many recreation areas of the sports fishery type and we are not faced with a unique situation as was the case when we required a substantial power loss at a Kern River dam in California in order to provide recreational advantages which could not otherwise be obtained. Therefore, there is no substantial basis for holding that the sports fishery in the upper Cowlitz has any significant intangible recreational values. Furthermore, the proposed reservoirs undoubtedly will offer other types of recreational opportunities similar to those afforded at other large reservoir projects in other streams, so that there should not be a total loss of recreational values as apparently suggested.

There would not be too much of an anadromous fishery problem at these and similar dams if means could be found for passing the adult migrants upstream and the fingerlings downstream. To get the adult fish by the dams for spawning in the upstream areas, the City proposes to construct fish ladders and

also to provide trapping and hauling facilities, so that they may reach natural spawning grounds. As a complement to the other fish protection measures, both as related to upstream and downstream migrations, the City proposes to construct and operate extensive fish hatchery facilities for artificial propagation of the fish and development of fingerlings capable of making the migrations to the sea.

The testimony does not show that fish ladders of the heights proposed, 185 feet of ascent in one case and 325 feet in the other, would be fully effective, and of course no one can tell until a test has been made and actual conditions studied. Also details of construction must be worked out, such as entrance ways and attraction water for the fish ladder, the use of resting pools and the design of adequate means to pass the fish into the Mossyrock reservoir at different elevations of water. However, in this respect, as in connection with the other fish protective measures proposed the details have yet to be worked out. With suitable design to permit a wide range of operating variations to meet situations reasonably to be anticipated, there would be provided here a full-scale laboratory for research and experimentation by means of which the answers to many perplexing problems of fish protection and propagation can be obtained. The recommendation of the Examiner for denial of the license until the City completes further experimentation at its own expense does not appear to offer a practical solution to the problem, especially

when there would be no assurance that the City would be given final authorization without many years of further study. Also, this recommendation would seem to rest upon the assumption that none of the measures proposed at this time would be of material assistance in saving the fish runs, an assumption which is not supported by the record.

It has been asserted that by the time satisfactory evidence can be obtained as to the success of the fishery conservation facilities proposed by applicant, the fishery resources may well be reduced to insignificance. Being cognizant of this possibility, we propose that the hatchery facilities be provided soon enough to assure initially maintenance of a sizable seed stock and later to complement the natural productivity above the dams. The use of fish hatcheries has been particularly successful in connection with runs of fall chinook and silver salmon, which constitute about 70 per cent of the total commercial fish and about 60 per cent in value of the commercial and sport fish. Furthermore, a substantial portion of the $20 million proposed for Federal expenditure in the Columbia River fisheries plan, probably almost half of the total sum, is to be spent for construction of fish hatcheries and related facilities. This would seem to be an endorsement of this method of preserving anadromous fish and an indication that it should be used on the Cowlitz River.

Regardless of the details of the methods used, the record shows that adult anadromous fish are now

being passed upstream by high dams successfully and that by trapping and hauling on the Cowlitz similar fish could be taken past the proposed dams reasonably satisfactorily.

While there are several biological and engineering problems to be studied in connection with the ladder system, the record clearly does not support a rejection of the proposals at this time. We recognize that the problems will differ in several details during the construction period and after the dams are placed in operation, and the best solutions must be decided upon for each period. Studies of these problems should go forward promptly and we expect the City either to employ its own biologist or to make suitable arrangements with the State of Washington for expert assistance in exploring all possible means of working out the details of this and other problems dealing with the fishery conservation facilities.

It is when we come to the facilities proposed by the City for passing fingerlings downstream past or through the dams that the novelty of the proposal is evident. After spawning in the headwaters the adult salmon perish. The fry fish which come from eggs remain in the fresh water for several months, sometimes as long as two years, before beginning their migration downstream to salt water where their principal growth takes place. At the time of their downstream passage these fingerlings are seldom over six inches in length and the problem on streams and rivers having dams has been to provide for their passage without injury or substantial loss. Up to

the present time there have been no constructive proposals for passing fingerlings downstream past dams. Usually the fingerlings make their way over spillways or through turbines and in each case there are losses.

To solve this problem in a new and untried manner, the City proposes to incorporate a system of passageways and chambers in the upper Mossyrock dam to which the fingerlings will be attracted and through which they will pass. The downstream fish passing system for the lower Mayfield dam will be much more simple as the reservoir behind it will not have a substantial fluctuation. The turbine intakes at Mossyrock and Mayfield dams would be screened off to prevent entry of any fish.

At Mossyrock dam a series of entries or ports would be provided in the upstream face of the dam through which the fish would enter a trunk passageway to a large tank and thence through other passageways being gradually passed through the dam and released at a proper point downstream. As the flows at the penstock intakes would be only about 3,300 c.f.s. spread over a 28-foot opening, there would be a low velocity of approach and therefore the problem of screening should not be difficult of solution. If the fingerlings can be induced to enter the ports along the upstream face of Mossyrock dam, the problems of pressure and movement through the dams would be largely engineering. It is clear from the record that many details of the downstream passing facilities are yet to be worked out.

CONCLUSION

From our analysis of the evidence in the record and the arguments advanced on both sides we have reached the conclusion that a fair and reasonable balance can be struck. Probably not all of the present fishery values could be salvaged if the proposed dams are constructed, but certainly not all of those values would be lost as the interveners seem to contend.

We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For these reasons we are issuing the license

with certain conditions which are set forth in our accompanying order.

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THOMAS C. BUCHANAN, *Acting Chairman,*

.....

CLAUDE L. DRAPER, *Commissioner,*

.....

NELSON LEE SMITH, *Commissioner,*

.....

HARRINGTON WIMBERLY, *Commissioner.*

Dated at Washington, D. C.,
this 27th day of November, 1951.

.....

LEON M. FUQUAY, *Secretary.*

Date of Issuance: November 28, 1951.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Acting Chairman, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

November 27, 1951

In the Matter of
CITY OF TACOMA, WASHINGTON } Project No. 2016.

ORDER ISSUING LICENSE (MAJOR)

Application was filed on December 28, 1948, and later supplemented, by the City of Tacoma, Washington, for a license under the Federal Power Act for a proposed hydroelectric development, designated as Project No. 2016, to be located on the Cowlitz River in Lewis County, Washington.

A public hearing on the application was held in Washington, D. C., commencing on November 2, 1950, before an Examiner of the Commission, in which hearing all parties, including the Applicant and the Staff of the Commission, as well as two agencies of the State of Washington, the Attorney General of the State of Washington, and the Washington State Sportsmen's Council, Inc. participated, and presented testimony and documentary exhibits. In addition, the Commission itself held a portion of the hearing in Tacoma, Washington, at which all persons desiring to speak either in favor of or in opposition to the issuance of a license for the proposed project were heard. After the close of the hearing,

briefs were filed by the various parties and by the Staff and a recommended decision was rendered by the Presiding Examiner containing findings and conclusions. On October 31, 1951, the Commission heard oral argument on exceptions to the Examiner's recommended decision.

For the reasons set forth in Opinion No. 221, adopted this date and made a part hereof by reference, and upon consideration of the entire record in this matter, including the reports of the Federal agencies, protests from interested citizens, the briefs of the parties filed in connection therewith, the Examiner's recommended decision and the oral argument thereon, the Commission *finds*:

(1) As previously found by the Commission, construction and operation of the two dams and reservoirs comprising proposed Project No. 2016 will affect lands of the United States; and could be so operated as to materially affect the navigable capacity of the Cowlitz River below the site of the proposed projects; and either or both of the reservoirs will affect the interests of interstate or foreign commerce.

(2) The project proposed by the Applicant will consist of two dams and appurtenant reservoirs named Mossyrock and Mayfield, respectively, located on the Cowlitz River in the State of Washington. Mossyrock, with a usable reservoir storage capacity of 824,000 acre-feet, will have an initial installed capacity of 225,000 kilowatts and an ultimate installed capacity of 300,000 kilowatts. Mayfield will have a usable reservoir storage capacity of 21,000 acre-feet, an initial installed capacity of 120,000 kilowatts, and an ultimate installed capacity of 160,000 kilowatts.

(3) The project proposed by the Applicant will have initially a plant capability varying from 345,000 kilowatts at full head to about 270,000 kilowatts, depending upon the amount of drawdown. The average dependable capacity over a 50-year period will be 275,000 kilowatts. The average annual energy output will be about 1400 million kilowatt-hours. Because of the diversity in stream flow and the large storage capacity which will be provided in the Mossyrock reservoir, a like amount of energy will also be available during a year of most adverse stream flow on the systems of the cities of Tacoma and Seattle, or on the systems of the Northwest Region.

(4) During the months of October through the following May all or a part of up to 260,000 acre-feet of the storage capacity of the Mossyrock reservoir will be reserved for temporary storage of flood waters and in most water years additional storage capacity will be available for the storage of flood waters under the plan of operation.

(5) Operation of the project in the interest of flood control will be equivalent to reducing the flood of record (December 1933) on the Cowlitz River (should it re-occur) from 140,000 cubic feet per second at Castle Rock, Washington, to 70,000 cubic feet per second (bank full capacity) at Castle Rock.

(6) Water traffic on the Cowlitz River is presently confined largely to the lower six or seven miles of its length, but the river may be navigated for some miles upstream.

(7) The project will be operated so as to increase the average minimum flow in the river between Toledo and Castle Rock, Washington, from about 1,000 cubic feet per second to 2,000 cubic feet per second with the resulting 6-inch

increase in navigable depths over the shoals in the river between those two places.

(8) Two proposed reservoirs will be easily accessible by a state highway and will offer substantial recreational opportunities to people from local and distant areas.

(9) The future peak loads for the systems of the cities of Tacoma and Seattle will probably increase annually by at least 40,000 kilowatts and the energy requirements will probably increase annually by at least 200 million kilowatt-hours. These probable annual increases in peak load and energy requirements do not include additional load and energy to be required as the result of defense activities.

(10) The dependable capacity of the hydroelectric power plants of the Tacoma and Seattle systems, including the addition of new hydroelectric capacity presently planned or being installed, but exclusive of the Cowlitz project, is 700,000 kilowatts when used to serve a combined power load of 1,165,000 kilowatts. The dependable capacity is somewhat less when used to serve combined loads of smaller magnitude. This 700,000 kilowatts of dependable hydroelectric capacity will not be sufficient to serve estimated system load of Tacoma and Seattle beyond 1953.

(11) The Northwest Region has been deficient in dependable capacity to supply the area loads for 1946 to 1949 and during those years the amount of load actually carried was in excess of dependable capacity because the river flows were in excess of those experienced during the period of the most adverse stream flow. In addition, some loads were carried on an interruptible basis.

(12) During the winters of 1947-1948 and 1948-1949 a shortage of power supply occurred in

the Northwest Region, resulting in curtailment of load. Only because exceptionally good water conditions existed during the winter of 1949-1950 was it possible to escape serious curtailment of loads during that period.

(13) There have been restrictions on the additions of new loads on the electric systems of the Northwest Region prior to the advent of the national emergency and the power shortage is even more serious at the present time in spite of the speed-up efforts being made by the agencies of the Federal Government and others to provide additional power supply as quickly as possible.

(14) The actual loads in the Northwest Region have been exceeding estimated loads for the present water year 1950-51.

(15) The existing power shortage in the Northwest Region is more acute in the area on the west side of the Cascade Mountains, including the Puget Sound area, than it is on the eastern slopes of the Cascades.

(16) In recent years the Federal Government has provided the major portion of new power supply provided in the Northwest Region. The various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River basin have not been met.

(17) Because of the time lag which has developed between growth or requirement for power and construction of power supply facilities, there will not be firm power available to supply full potential loads until after 1958 and interim power supply for some new industrial loads will necessarily be sold on an interruptible basis.

(18) At the present time, during the national emergency, steps are being taken to provide as much new power supply as possible to meet the new defense electric loads. A tentative so-called "speed up program" of construction of new power supply has been prepared by the Bonneville Power Administration and others for the primary purpose of obtaining additional power supply for defense loads. This program is in final form and further authorization and funds must be obtained from Congress before the program can be completed.

(19) If a critical water year should occur in the winter season of 1950-51 there would be a 425,000-kilowatt average power shortage in the Northwest Region of which only 125,000 kilowatts would be interruptible load.

(20) Based on estimated future loads for the Northwest Region and the estimated power supply that is to be provided to supply such loads, there will be a deficiency of dependable capacity in the Northwest Region until about 1960, at which time there should be just about sufficient capacity for load and for adequate reserves. Without the addition of new defense loads, the deficiency in dependable capacity in 1955 will be about 430,000 kilowatts, and there could be a deficiency in plant capability of as much as 870,000 kilowatts. Should an adverse water year be experienced prior to the year 1954, it would be necessary to curtail seriously the general service load of the Northwest Region.

(21) As the Northwest Region will continue to be deficient in power supply for approximately the next ten years, only such new loads can be taken on as can be supplied by development of new power sources.

(22) There will be a power market available for the type of power that could be produced by the

Cowlitz Project as soon as that output would be made available and there will also be a market for all other new sources of power that might be developed under existing plans. Because of its size, location and characteristics of power output, the Cowlitz Project will be an exceptionally valuable addition to the Northwest Region power supply and will relieve to some extent the power shortage which may continue for almost a decade.

(23) Annual peak power demand in the Northwest Region occurs during the period when the flow of water in the main stem of the Columbia River is low. As the flow of the Cowlitz is high at the time the flow of the Columbia is low, the Cowlitz Project output could fit into and be of material advantage to the coordinated operation and permit utilization of this diversity in stream flow to supply a large block of power at the time of regional system peak loads. The addition of 345,000 kilowatts of installed capacity which could be provided initially by the Cowlitz Project, if made within three years, would assist greatly in alleviating the power shortage in the Northwest Region and because the project would be located in western Washington, a displacement of power flows from the eastern portion of the Bonneville system into the Tacoma-Seattle-Portland area would result in a reduction in transmission line losses. Further, the Cowlitz River Project will improve the flexibility of the Northwest Power Pool by making available more synchronizing power west of the Cascade Mountains.

(24) By adding from 270,000 kilowatts to 345,000 kilowatts of new capacity, the Cowlitz Project will reduce substantially the amount of "load-shedding" in the Tacoma-Seattle area that

now occurs when operating troubles develop on the system of the Northwest Power Pool.

(25) During the flood periods on the Columbia River the Cowlitz Project could offer substantial power assistance to the Portland area.

(26) On the basis of the evidence in this record, none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project.

(27) The Applicant has a preference, under the law, over private utilities in the purchase of power from Bonneville Power Administration.

(28) The only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line by 1954 consist of the proposed Cowlitz Project and new steam electric plants.

(29) The cost of the proposed project will be about $135 million exclusive of any required fish handling facilities.

(30) The estimated cost of the fish handling facilities presently proposed by the Applicant for construction as a part of the proposed project is $7,100,000.

(31) The annual value of Cowlitz power will exceed the annual cost of producing that power by at least $1,700,000 based on an interest rate of 2 percent.

(32) Although no monetary value has been assigned to the flood control or navigation benefits which could be provided by the project, the former benefits will be substantial and the navigation benefits will be direct and of increasing usefulness.

(33) For an average cost of money of 2.5% for 42 years or 2.75% for 38 years, the ratio of gross earnings to debt service requirements would

be 1.5 under the existing rate schedules of the Applicant with a minimum realization of 6 mills per kilowatt-hour, and a debt of $135 million could be financed by the City of Tacoma system at a satisfactory average money cost. If the Cowlitz Project cost were $142 million rather than $135 million, the debt could also be retired in reasonable time.

(34) The project as proposed by the Applicant will utilize to the maximum feasible extent all of the fall and the full flow of the Cowlitz River throughout the reach of the river to be developed and the available water resources in the reach of the Cowlitz River involved for power, navigation and flood control purposes.

(35) The project, if constructed according to the plans submitted by the Applicant, will be safe and adequate to develop the available water resources at the two sites for power purposes and the plans for the power features of the project conform with accepted engineering practices.

(36) Proposals by the U. S. Fish and Wildlife Service for the improvement of spawning conditions and an increase of the salmon runs into tributaries to the lower Columbia River have been expanded and formalized by the Fish and Wildlife Service in the Lower Columbia River Fishery Plan. The purpose of the plan is to conserve, rehabilitate and enhance the fishery resources of the Columbia Basin, and the plan was devised to offset effects caused by constructed and proposed dams in the Columbia River Basin.

(37) The Lower Columbia River Fishery Plan was conceived around 1945. In 1946 Congress provided legislation which enabled the States to be brought directly into the program, and on June 23, 1948, the Fish and Game Commis-

sions of the States of Washington, Oregon, and Idaho entered into an agreement with the Fish and Wildlife Service outlining the areas of authority of the States and the services and duties of each under this fisheries program. The program generally is to be performed by the States under the agreement, with funds appropriated by Congress in the annual appropriation made to the Army Engineers to carry out its civil functions, and these funds are then transferred by the Army to the Fish and Wildlife Service.

(38) While Congress has not specifically approved or adopted the $20,000,000 Lower Columbia River Fishery Plan, it specifically authorized and appropriated funds in the fiscal years of 1949, 1950 and 1951 to be used for specific facilities included in the plan.

(39) Both the U. S. Bureau of Reclamation and the Army Engineers have subscribed to the objectives of the Lower Columbia River Fishery Program and to its completion by the Fish and Wildlife Service as rapidly as funds will permit. The Army Engineers in the comprehensive basin plan included in the "Review Report on Columbia River and Tributaries" have given full approval to this program, and have recommended that development of the basin be so scheduled as to permit the full implementation of the program. The Board of Engineers for Rivers and Harbors have recommended that the fishery program be advanced, and the Chief of Engineers in his letter transmitting the Review Report to the Secretary of the Army for submission to the Congress recommended that Congress give favorable consideration to the Lower Columbia River Fisheries Plan.

(40) While there are several problems which require both engineering and biological study in connection with the fish ladder system pro-

posed for passing upstream migrants over the proposed dams before adoption of a final design, the present data in the record is promising enough in prospect as to not support a rejection of such a ladder system at this time. The alternative method of trapping and hauling upstream migrants past the dams should produce reasonably satisfactory results.

(41) While the record does not show conclusively whether certain features of the facilities proposed for passing downstream migrants would be adequate to prevent excessive losses, the record does indicate that with proper testing and experimentation it should be possible to provide fish handling facilities of the type proposed, which will prevent undue losses of downstream migrants. Further tests and experimentation should be made before any permanent features of the fish handling facilities for downstream migrants are constructed.

(42) While the Applicant has proposed conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River watershed in addition to the facilities proposed for installation at or in the dams, such proposals and the effect thereof are not sufficiently detailed in the record to permit an adequate appraisal of their effectiveness. However, they show enough promise to justify the carrying through of more detailed studies and plans.

(43) On the Cowlitz River watershed the total annual gross value due to all fish, regardless of species, attributable to the area above Mayfield, is roughly equal to that below Mayfield, in each case being about one million dollars.

(44) The annual net dollar value due to the fish attributable to the area above Mayfield is about equal to that below Mayfield, and in each case

that value may be considered roughly as being approximately $600,000. The annual net value due to fish, exclusive of recreational values derived from the sportsmen's catch, is estimated to be about $515,000 above Mayfield and about $45,000 below Mayfield.

(45) The annual net recreational dollar value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River system above Mayfield is estimated to be about $76,000 which is one-half the estimated gross recreational fish value. The annual net recreational dollar value which would be provided by the Mayfield and Mossyrock reservoirs would offset, to an extent which cannot be now determined, the loss of recreational value occasioned by the construction of the project.

(46) The annual net recreational value of the sportsmen's catch of anadromous fish attributable to the Cowlitz River basin below Mayfield is estimated to be about $136,000.

(47) The investment cost of facilities and improvements for the Applicant's fishery resources program, if permitted to proceed under license, would be at least $9,465,000. Using this estimated cost, which has been derived by the Staff, the annual cost of operating and maintaining facilities and improvements plus the fixed charges on the investment may be estimated at $610,000.

(48) The record does not show that construction, maintenance and reasonable operation of the Cowlitz Project would have any substantial adverse effect on the fishery resource below the Mayfield site, and there are indications that conditions downstream will be improved somewhat when the project is constructed.

(49) If it is assumed that there would be no measurable loss of the fishery resources of the

Cowlitz River system resulting from the construction, operation and maintenance of the proposed project, the annual net benefits of the proposed project, exclusive of navigation and flood control benefits, would be $1,090,000 ($1,700,000 power value less $610,000 fish facilities operating cost).

(50) If it is assumed that one-half of the fishery resources above Mayfield is saved after construction of the proposed project, the annual net benefits of the project, exclusive of navigation and flood control benefits, would be $790,000 ($1,700,000 power value less $610,000 fish facilities operating cost less $300,000 fish loss).

(51) Even if no fish were saved above Mayfield after construction of the proposed project, the annual net benefits of the project exclusive of navigation and flood control would be $499,033 ($1,700,000 power value less $610,000 fish facilities operating cost less $590,967 fish loss).

(52) Based on cost data in the record and on estimates made to approximate other costs, the Cowlitz Project would be financially and economically feasible if constructed in accordance with the plans as presently submitted.

(53) The Applicant is a municipal corporation; it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; and it is a municipality within the meaning of Section 3(7) of the Act.

(54) The Applicant has submitted satisfactory evidence of its ability to finance and carry to completion the project described in the application, with such modifications as may be found to be appropriate.

(55) No conflicting application is before the Commission. Due public notice has been given.

(56) The proposed project will not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States.

(57) The issuance of a license for the project will not interfere or be inconsistent with the purposes for which any reservation or withdrawal of public lands was created or acquired.

(58) The ultimate installed horsepower capacity of the project hereinafter authorized is 474,000 horsepower and the energy generated thereby will be sold or used by the Licensee.

(59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

(60) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified, and the amount of annual charges to be paid under the license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way, should be later determined.

(61) In accordance with Section 10 (d) of the Act the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

(62) The exhibits described and designated below, filed as part of the application for license as supplemented, conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(63) The proposed project will consist of two developments, namely, Mossyrock and Mayfield, as follows:

(a) The Mossyrock development will be located on the Cowlitz River at about mile 65 and will consist of a concrete gravity dam or other suitable type of dam as may be determined by further investigation and design. The dam will be about 510 feet maximum height above bedrock and about 1300 feet in length at its crest and contain an ogee type spillway surmounted by 5 taintor gates. The reservoir will extend approximately 21 miles upstream and have an area of about 10,000 acres with normal water surface at elevation 750 feet, a gross storage capacity of about 1,372,000 acre-feet, and a usable storage capacity of about 824,000 acre-feet with a 100-foot draw-down; a powerhouse built integral with the toe of the non-overflow section of the dam as a foundation, with initial installation comprising three 75,000-kilowatt units, making a total capacity of 309,000 horsepower or 225,000 kilowatts operating under a gross head which would vary from 325 to 225 feet. Provision is to be made for a fourth additional unit of 75,000 kilowatts. A step-up

substation will be installed adjacent to the powerhouse. The Mossyrock development will provide flood-control storage as desired by the Chief of Engineers, Department of the Army.

(b) The Mayfield development will be located on the Cowlitz River at about mile 52 and will consist of a concrete dam composed of a small arch section across the narrow river gorge, an ogee gravity spillway section surmounted by 5 taintor gates, and 2 gravity abutment sections, the dam to have a maximum height of about 240 feet above bedrock and a length of about 850 feet at its crest; a reservoir extending approximately 13.5 miles upstream to the Mossyrock dam with an area of about 2,200 acres with normal water surface at elevation 425 feet, a gross storage capacity of about 127,000 acre-feet and a usable storage capacity of about 21,000 acre-feet with a 10-foot draw-down; a tunnel about 880 feet long, with associated concrete head works, fish screens, forebay, gate house, and steel penstocks leading to the Mayfield powerhouse; a powerhouse with initial installation comprising three 40,000-kilowatt units making a total capacity of 120,000 kilowatts, or 165,000 horsepower, operating under a gross head which would vary from 185 to 175 feet. Provision is to be made for a fourth unit of 40,000 kilowatts. A step-up substation will be installed adjacent to the powerhouse. Double circuit 230-kilovolt transmission lines on steel towers will connect the two powerhouses and extend to the Cowlitz substation on the outskirts of Tacoma. These lines will have an aggregate length of about 60 miles.

(c) Such fish ladders, fish traps or other fish handling facilities or fish protective devices as may be hereafter approved by the Commission upon the recommendation of the Secretary of the Interior.

(d) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

EXHIBIT J

Drawings in two sheets, Sheet 1 signed by C. A. Erdahl, Acting Mayor and Commissioner of Public Utilities, December 24, 1948, and Sheet 4 signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, June 15, 1949 and comprising:

Sheet 1 (FPC No. 2016-1) entitled "Location Map"; Sheet 2 (FPC No. 2016-4) entitled "General Project Map."

(e) The principal structures referred to above, the location, nature and character of which are more specifically shown by the exhibits hereinbefore cited and by certain other exhibits which also formed part of the application for license and which are designated and described as follows:

EXHIBIT L

Drawings in 13 sheets, signed by C. V. Fawcett, Mayor, and approved by C. A. Erdahl, Commissioner of Public Utilities, Sheet 1 on December 24, 1948 and the other sheets on June 15, 1949, and comprising:

Sheet 1 (FPC No. 2016-2) entitled "Mayfield Dam, General Plan";

Sheet 3 (FPC No. 2016-5) entitled "Mayfield Dam, Arch and Thrust Blocks, Plan and Sections";

Sheet 4 (FPC No. 2016-6) entitled "Mayfield Dam, Cross Sections Thru Spillway";

Sheet 5 (FPC No. 2016-7) entitled "Mayfield Powerhouse, Plans and Sections";

Sheet 6 (FPC No. 2016-8) entitled "Mayfield Powerhouse and Intake, Typical Section";

Sheet 7 (FPC No. 2016-9) entitled "Mayfield, One Line Diagram";

Sheet 8 (FPC No. 2016-10) entitled "Mayfield Switchyard, General Plan";

Sheet 11 (FPC No. 2016-13) entitled "Mossyrock Powerhouse, Plans and Sections";

Sheet 12 (FPC No. 2016-14) entitled "Mossyrock Powerhouse, Typical Cross Section and Elevation";

Sheet 13 (FPC No. 2016-15) entitled "Mossyrock One Line Diagram";

Sheet 14 (FPC No. 2016-16) entitled "Mossyrock Switchyard, General Plan";

Sheet 9 (FPC No. 2016-17) entitled "Mossyrock Dam, Plan and Section"; and

Sheet 3 (FPC No. 2016-18) entitled "Mossyrock Dam, Spillway Section."

EXHIBIT M

A statement in four sheets entitled "General Description and General Specifications of Proposed Mechanical, Electrical and Transmission Equipment for the Project" and filed June 20, 1949.

(f) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project is approved or acquiesced in by the Commission; also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

(65) The Secretary of the Army and the Chief of Engineers have approved the project plans insofar as they affect the interests of navigation and flood control, upon the license conditions hereinafter provided for the protection of such interests.

(66) The Secretary of the Interior reported that he was hopeful that with proper effort and study the fish problem could be solved and recommended stipulations for the protection of fishlife. The substance of his recommendations has been included, with the exception of a requirement limiting the fish protective devices

to those approved by State agencies, a limitation which does not appear appropriate in a Federal license.

The Commission *orders*:

(A) This license is issued to the City of Tacoma, Washington, under Section 4 (e) of the Act for a period of 50 years, effective as of the first day of the month in which the accepted license is filed with the Commission by the Licensee, for the construction, operation and maintenance of Project No. 2016 upon the Cowlitz River, a stream over which Congress has jurisdiction, and upon lands of the United States, subject to the terms and conditions of the Act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license is also subject to the terms and conditions set forth in Form L-6 entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States", which terms and conditions are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

ARTICLE 28. The Licensee shall commence construction of the project within two years of the effective date of this license; shall thereafter in good faith and with diligence prosecute such construction; and shall complete the project works in 36 months.

ARTICLE 29. The Licensee shall prior to flooding clear all lands in the bottoms and margin of the

reservoir up to high water level, and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die during the operation of the project shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

ARTICLE 30. Before beginning the construction of any permanent fish ladders, fish traps or other fish handling facilities or fish protective devices, the Licensee shall make further studies, tests and experiments to determine the probable effectiveness of such facilities and devices and shall submit plans therefor and obtain Commission approval. In making such studies, tests and experiments and in the preparation of final design plans, the Licensee shall cooperate with the United States Fish and Wildlife Service and the Departments of Fisheries and Game of the State of Washington. The Licensee shall continue its studies and investigations with respect to its proposed program of stream improvement and hatchery facilities. The Licensee shall submit quarterly reports to the Commission of its activities hereunder.

ARTICLE 31. The Licensee shall construct, maintain and operate such fish ladders, fish traps or other fish handling facilities or fish protective devices and make such stream improvements and provide such

fish hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be prescribed hereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior.

ARTICLE 32. The Licensee shall pay the United States the following annual charges for the purpose of reimbursing it for the costs of administration of Part I of the Act; One (1) cent per horsepower on the authorized installed capacity (474,000 horsepower), plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calender year for which the charge is made. The Licensee shall also pay to the United States such charges as may be specified hereafter for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, including transmission line right-of-way.

ARTICLE 33. The Licensee shall, within two years of the effective date of this license, file Exhibits F and K in accordance with the rules and regulations of the Commission.

ARTICLE 34. During the months of October through May flood storage space reservation in Mossyrock Reservoir corresponding to reservoir level elevation 750, full reservoir, on 1 October, decreasing uniformly to elevation 723 on 1 December, remaining constant at elevation 723 from 1 December to 1 February, increasing uniformly from elevation 723 on

1 February to elevation 745 on 1 May and reaching elevation 750 no sooner than 1 June, shall be kept available for the temporary storage of flood water. During floods the gates shall be operated, in conjunction with the operation of the Mayfield Reservoir, so as not to exceed a flow of 70,000 cfs (bank full capacity) at Castle Rock, Washington, until the reservoir storage, if exceeding the specified reservation, has been decreased to the specified reservation.

ARTICLE 35. In the interest of navigation:

(a) The minimum release of water at the Mayfield plant shall be 2,000 cubic feet per second; and

(b) The rates of change of release of water from the Mayfield plant shall not exceed that which will cause a change of water level at the City of Castle Rock, Washington, of one foot per hour, either up or down.

(C) The exhibits specified in paragraph (63) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed within the 30-day period provided by Section 313 (a) of the Act.

(E) This license shall be accepted and returned to the Commission within 60 days from date of issuance of this order.

By the Commission.

(SEAL) /signed/ LEON M. FUQUAY.
Leon M. Fuquay, *Secretary.*

Date of Issuance: November 28, 1951.

APPENDIX B

Exerpt from Presiding Examiner's Recommended Decision

Findings and Conclusions—"Comprehensive Plan"

It is found, therefore, that the Chief of Engineers has submitted to the Congress for its approval a comprehensive plan for the development of the Columbia River and its tributaries, including the Cowlitz River, and that this comprehensive plan has been formally approved by the Secretary of the Interior and by the Federal Power Commisison as "representing a desirable and coordinated basic framework for the comprehensive development and utilization of the water resources of the Columbia River Basin." The report was approved by the President through the Bureau of the Budget for submission to the Congress. It is found also that the comprehensive plan of the Chief of Engineers includes full recognition and full adoption of the Lower Columbia River Fisheries Plan as conceived by the Fish and Wildlife Service of the Department of the Interior and as now in progress with the aid of specifically appropriated Federal funds. It is also found that this Commission in its formal comments approving the Chief of Engineer's plan and recommendations did not take exception to or suggest modification of the report or the recommendations with respect to the preservation of fishery resources in the Columbia Basin or the scheduling of projects for construction recommended therein with refer-

ence to preservation of the fishery resources, nor has there been any evidence submitted which would indicate that the Commission intends to forward additional comments to the Chief of Engineers or to the Congress which would qualify or withdraw any approval given heretofore. It is found also that the Lower Columbia River Fisheries Plan contemplates, among other things, reservation of the Cowlitz River, a lower tributary of the Columbia River, as a stream to be used by the Fish and Wildlife Service and the agencies of the State of Washington as a means for the preservation and improvement of anadromous fish life for the benefit of the entire basin, and a scheduling of dam construction, with emphasis upon early construction in the upper basin so as to afford the necessary time to improve the lower basin tributaries before all of the main dams (including the Mayfield and Mossyrock developments) in the lower basin are constructed.

It is concluded, therefore, that, unless an applicant for license for a hydroelectric project to be constructed, operated and maintained upon the Cowlitz River before the ten-year period contemplated for completion of the Lower Columbia River Fisheries Plan has expired, can demonstrate to the satisfaction of the Commission, prior to any construction or the issuance of a license therefor, (1) that its over-all plans for the development of the stream for power include plans for reasonably certain protection and development of the fisheries resources of the stream which would be entirely consistent with the prin-

ciples and aims of the Lower Columbia River Fisheries Plan and acceptable to the U. S. Fish and Wildlife Service, or, if this cannot be shown, (2) that the economic situation in the area and the need for an additional supply of electric energy, which cannot be obtained from any other source at this time, is *so pressing* as to require development of the Cowlitz River for power purposes with or without fish protective facilities which can be demonstrated prior to initiation of construction to be reasonably certain to accomplish their purposes, a finding at this time under Section 10(a) that the project is "best adapted to a comprehensive plan" for development of the Cowlitz River for all of the purposes named therein would not be warranted, and therefore such a finding would not be in the public interest.

APPENDIX C

Excerpt from Presiding Examiner's Recommended Decision

Tacoma's Needs for Additional Energy as Related to Regional Needs

The city and those who espouse its application have placed particular accent upon the need for additional generating capacity to supply the city's system requirements and to augment the sagging over-all regional power supply. It has been established beyond question that while the city is in a preferred-customer category insofar as Bonneville energy is concerned, the city's increasing power requirements and the continued assertion of its preferred status as a municipal customer of Bonneville Power Administration constitute an unnecessary drain on this Federal power supply so long as it has access to usable hydro sites and that the more sold to the city by Bonneville, the less Bonneville has to sell to other non-preference customers which are also in great need of as much of Bonneville energy as they can obtain. These contentions are undeniable, but they point up the fact that Tacoma itself is really not in present jeopardy so far as power supply is concerned. It is probable that if Tacoma persists in asserting its preferred customer status as against the other potential customers of Bonneville which do not enjoy such preferred status, while making no effort to increase its generating capacity, it may become a very unwelcome participant in the operations of the Northwest Power Pool, and, of course, the more

dependent Tacoma becomes on Federal energy supply, the less autonomous it will be as a system.

However laudable it may be for the city to make every effort to increase its own generating capacity in order to reduce its purchases from Bonneville and to make itself a contributor to the regional pool, or at least relatively independent of Federal generating capacity, it would seem that where such efforts appear to constitute a real jeopardy to an important natural resource, i.e., the fisheries of the region, the question of the impact on that other resource is worthy of closest scrutiny. If the City of Tacoma had no sources of energy other than its own hydroelectric and steam generating capacity, and if additional steam would be economically infeasible, then, and then only, should the question be raised as to whether it is in the public interest to place the fishery resource in jeopardy by installation of high dams across fish migration routes at this particular time.

There has been the contention advanced that the need for construction of these two dams has been rendered even more acute by the acceleration of the national defense program, and that if this license were denied and the project not constructed, the power shortage in the Pacific Northwest would be rendered more acute by the defense power loads. There seems to be little room for doubt that with the establishment of important defense industries in the region, all calling for large amounts of electric energy, every unit of electric generation will be used

to its maximum, and that there will be a need for development of more generating capacity at an early date unless civilian or non-defense consumption is not to be seriously curtailed. Curtailment of non-defense consumption is to be avoided if such be possible, of course, but should total mobilization of industry for war be required, those loads not directly related to a war program would have to be secondary. But as of this time, the Government's policy appears to be that of maintaining high defense production with as little effect upon non-defense production as possible (sometimes called the "guns and butter" policy), and to discourage the expansion of non-defense consumer demand by credit controls, taxes, price controls and allocation of basic raw materials.

While the addition of generating capacity in the Pacific Northwest is highly desirable and necessary from the standpoint of national defense, if the policy of less than the most stringent curtailment of civilian or non-military production continues to prevail, no real case can be made for the installation of this particular additional generating capacity by the city on the basis of its necessity for national defense, if by the installation of such capacity there is a better than even chance that another important natural resource will be unnecessarily destroyed or even seriously impaired by reason of such installation. And such installation would be unnecessary if there are other and ample undeveloped power sources in the basin (whether available for exploitation by Tacoma or not), which have no effect on the fisheries re-

sources. While it cannot be the province of the Examiner *sua sponte* to evaluate all unused sites, even if such were possible,[26] the record indicates that (disregarding the aspect of relative cost) there are a good number of hydroelectric sites capable, from an engineering standpoint, of producing large amounts of additional electric energy by the greater use of the Columbia headwaters, headwater tributaries and streams already blocked, and that the development of these sites will have little or no effect upon the Columbia River fisheries conservation program.[27] It is the thesis of the proponents of the Lower Columbia River Fisheries Plan that these harmless (to fish) sites should be developed first, even if they are somewhat more expensive than the lower river sites, and then and then only should the question be seriously approached as to whether it is necessary to destroy fishery resources in order to obtain more power. This is the general position adopted by the Army Engi-

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[26] The record is somewhat deficient in the matter of comparing unused and available hydroelectric sites which could be developed by the Applicant itself in lieu of the Cowlitz sites, and this is understandable. Hydroelectric developments are not planned casually. In order to compare the Cowlitz sites with other undeveloped sites, it would be necessary for someone to undertake almost as intensive study of the other sites as was undertaken for the Cowlitz sites. Such a study would be time-consuming and costly. The Applicant did not undertake such a study. The Interveners did not undertake such a study, and the staff of the Commission does not have the field force and funds to make intensive studies of alternate sites.

[27] While the Yale site on the Lewis River is not available to the Applicant, the energy it will produce will have a marked effect upon the regional power supply. On April 25, 1951, the Commission issued a license for the Yale Project which will have an initial installed capacity of 100,000 kw. Provisions are made for another 100,000 kw which the Commission can order to be installed concurrently with the first 100,000 kw if it so desires. By order issued May 2, 1951, the Commission ordered the installation of six 25,000 kva generating units at the Rock Island Project (Project No. 943) which will produce approximately 135,000 kw.

neers which has apparently been concurred in by the Federal Power Commission, and has been reiterated by the President's Water Resources Policy Commission in its recent report.

It is true, of course, that many of the unused sites, particularly the headwater sites referred to, are, for the most part, distant from the load centers where power is urgently needed, and particularly the coastal load centers, and that additional transmission line costs and transmission losses would be involved in their use as compared to the conveniently located Cowlitz sites. Outages will be increased. And the diversity of flow which makes the lower Columbia tributaries (west of the Cascades) so attractive for power sites to augment the power obtained on the main stem is not to be obtained in the headwater streams. It is true also that some of these sites have been recommended by Federal agencies for Federal construction, and from a practical standpoint may not be available for non-Federal development even if the City of Tacoma were to choose to do so.[28] It would seem that there are ample undeveloped water power resources in the Basin which, although more distant from Tacoma's load centers than the Cowlitz projects and therefore not convenient or economically feasible for exploitation by Tacoma, if developed by the Federal government or

[28] And choice of some sites not included in the plans of the Corps of Engineers might be considered as interference with the recommended program of large, multiple-purpose developments, which may themselves be far too expensive for other than government development.

by the Secretary of the Interior that Cowlitz projects are essential to national defense. Through the Administrator of the Defense Electric Power Administration, which heads up the national defense power program, the Secretary of the Interior, of course, could have notified the Commission that DEPA regarded the Cowlitz project in such category. That this aspect was considered by the Secretary is evident from his letter to the Chairman of the Commission dated October 29, 1949 (Exhibit 6), in which it is stated:

> "The Department is fully cognizant of the shortage of power supply in the Pacific Northwest. As the dominant supplier of electric energy in the region, the Federal Government has a major share of the responsibility for the regional power supply. The Department will continue to urge that all practicable steps be taken to the end that the period of power shortage to be kept at a minimum."

In a subsequent letter, dated May 1, 1950 (Exhibit 8) the Secretary said:

> "I reiterate that the Department's responsibilities in both the fields of fish conservation and hydroelectric development compel us to explore all possible means of reconciling what has appeared to be an outright clash of interests.
>
> "I am hopeful, however, that with proper effort and study this problem can be solved."

If the Applicant were permitted to commence construction of the Cowlitz project immediately, there would be three years spent in such construction, at least, which seemingly would make this source of

by non-Federal interests under license, could supply to the regional net all of the energy that would be needed in the region in the foreseeable future without the objectionable features of present use of the Cowlitz sites.[29] While national defense is, in a real sense, the responsibility of every citizen, and of every city, and of every State, the Federal Government, through the Congress, obviously has a primary responsibility in that respect of a greater magnitude than the responsibility of any State or municipality. Particularly is this so since the Federal Government has already assumed a major role in the development of the hydroelectric resources of the Pacific Northwest, and power production and use have been geared to the Federal program, particularly in that region. However desirable it may be for the City of Tacoma to achieve greater independence with respect to power development and to supply its own requirements from its own nearby facilities, and therefore to become a power creditor region-wise rather than a debtor, if the cost of achieving such independence is the substantial impairment of the fisheries resource, the cost would appear to be far too great as of the present date. It should be noted that the record is devoid of any communication or suggestion

[29] Projects authorized and recommended for authorization would provide nearly 8 million kilowatts of additional energy. The authorized projects, which would provide 2,266,500 kw are: Chief Joseph, Ice Harbor, Lower Monumental, Little Goose, Lower Granite, Palisades, Rosa, and Chandler. Recommended for authorization are: Libby, Albeni Falls, Priest Rapids, John Day, The Dalles, Hills Creek, Cougar, Green Peter, White Bridge, Dexter, Hells Canyon, Upper Scriver, and Lower Scriver. This latter group would provide 5,551,600 kw.

energy of dubious value insofar as present defense needs are concerned.[50] And if the agencies of the State and sportsmen's organizations continue their opposition as long as possible, it could be that years would elapse before construction of the project could be commenced safely and the necessary financing be given the green light. On October 6, 1948, Virginia Electric and Power Company filed an application for a license to develop the Roanoke Rapids site on the Roanoke River in North Carolina. Despite the most expeditious handling of the application by the Commission and its personnel, and despite the fact that a license has been issued for this project and accepted, the matter is now before a Circuit Court of Appeals and initiation of construction has been held up approximately three years.

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[50] Currently there is being debated in Congress a bill—H. R. 3294, 82nd Cong., 1st Sess. (Committee on Interior and Insular Affairs) which would authorize an interconnection of the power generating, marketing, and transmission facilities of the Bonneville Power Administration and the Bureau of Reclamation in the states of California, Idaho, Oregon and Washington. This legislation is still in the formative stage, but if such an interconnection were made, it would undoubtedly serve the important function of power interchange in vital areas. Such an interconnection would probably give great relief to the power shortage in the Northwest, and could be effected much sooner than any hydroelectric projects—including the Cowlitz project—could be built and put on the line.

APPENDIX D

Biological Supplement to Recommended Decision of Presiding Examiner

The Cowlitz project proposed by the Applicant includes two high dams in series, which, unless unique fish passage facilities can be devised which are highly efficient, would prevent the natural upstream and downstream migration of anadromous fish in the Cowlitz River and thereby would adversely affect the fishery resources thereof. Being cognizant of this situation, the Applicant believes it has devised a means of passing anadromous fish over both dams upstream and downstream. Further, in addition to the facilities at the dams, the Applicant, by provision for hatchery facilities and through stream improvements, would propose to overcome any adverse effects not eliminated by the fishways installed in the dams and to enhance the fishery potential to the extent economical. Considerable testimony, exhibits and opinions were presented on this aspect of the fishery matter. As the record includes conflicting views on many items of this fishery resource problem, it appears appropriate to set forth herein a rather detailed summary of the evidence relating to this phase of the case.

At the present time the Cowlitz River is one of the important salmonoid (i. e. salmon or salmon-like) fishery resource rivers of the lower Columbia River Basin. In its current condition it is sufficiently

utilized by anadromous fish to produce adequate numbers to permit the taking of a sizeable commercial and sports catch called "cropping" and still leave an adequate number for passage to spawning ground called "escapement" (meaning spawning fish) for reproduction so as to sustain a high population level year after year. Although the Cowlitz River fishery includes some domesticated fresh water fish, its principal value as a fishery resource is due to the anadromous fish, especially the salmonoids which use its waters and beds for spawning and initial rearing of young. To assure an adequate escapement of anadromous fish, the State of Washington controls the numbers of and times when the anadromous fish may be caught both commercially and by sportsmen. The anadromous fish of the Cowlitz River and tributaries comprise the following: spring chinook (or King) salmon, fall chinook (or King) salmon (*Oncorhynchus tschawytscha*), silver salmon (*O. Kisutch*, sometimes called silverside or Coho salmon), chum salmon (*O. Keta*, sometimes called dog salmon), steelhead trout (*Salmo gairdneri*), sea-run cutthroat trout (*Salmo Clarkii*) and Columbia River smelt. The resident fish are whitefish and trout. Of the anadromous group only the spring chinook, fall chinook and silver salmon, the steelheads and cutthroat trout, and the smelt are of sufficient importance to merit consideration in the evaluation of the Cowlitz fishery resource. The relatively few chum salmon found on the lower Cowlitz

River below Mayfield and the resident fish are not indicated to be a significant portion of the Cowlitz fishery. In the State of Washington the salmonoids are classified as food fish and the trout as game fish.

The three groups of anadromous fish which inhabit the Cowlitz River, namely the salmonoids, the seagoing trout, and the smelt, utilize the fresh water areas only for reproductive purposes and for the early rearing of young. These fish spend the greater part of their life cycle in the Pacific Ocean where they attain most of their growth and maturity. The life cycle of each of these groups is different in some respects.

The salmonoid fish, as they near maturity in the ocean, develop the reproductive urge and start to migrate to the same fresh water area where they originated as infants. Upon leaving salt water enroute to the fresh water streams selected by its homing instinct, the adult salmonoid stops feeding and depends entirely upon the energy stored in its body for getting it to its own spawning ground in the fresh water of its "parent stream." After reaching suitable spawning grounds in rapidly moving water, the salmon make large nests (at a depth of one to several feet) in the gravelly bed of the stream, where eggs are laid by the female and then fertilized by the male. Soon, thereafter, the adult parent salmon die, their carcasses adding minerals to the fresh water area. In due time (about 90 days) the fertilized salmon eggs hatch and some of the fingerlings begin mi-

gration to sea almost as soon as the egg yolk is absorbed;[1] others may stay in fresh water for varying lengths of time (from 12 to 16 months), depending upon whether they are spring chinook, fall chinook or silvers. The fingerlings of the salmonoids attain only a small part of their ultimate weight in fresh water, and it is during the salt water phase of their life cycle (several years) that they attain the major portion of their growth and size.

The steelhead trout have a life cycle very much like that of the salmonoids. Steelheads spend about 20 months in fresh water, migrate to sea in the second spring, spend less than two years at sea, and then reenter the Cowlitz as mature fish. More than 50 percent of steelheads mature after two years in salt water. Steelheads may spawn as often as two or three times before dying. Some come back to spawn on successive years while others take two years to redevelop sexual products. Steelhead, like the salmonoids, almost invariably return to the areas where they were spawned. However, they feed to some extent in fresh water.

The cutthroat trout spend the first two years in fresh water and then migrate seaward. They feed in salt water for four or five months and then reenter the Columbia, then the Cowlitz, and follow the salmon, feeding on their eggs, and then go back to sea and return to spawn. They, like the steelhead, spawn more than one time.

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[1] The infants subsist on the yolk sac for about the first 30 days of life.

There is a commercial smelt fishery on the Cowlitz River. In addition, there is an extensive sports smelt fishery. Unlike the other anadromous fish, the smelt do not always return to the same stream to spawn and are quite unpredictable in this respect. The smelt attain maturity in three or four years then spawn and perish after spawning. Adult smelt are about seven inches long, and about eight fish weigh one pound.

The important salmonoid fish of the Cowlitz River Basin use various parts of the streambeds for spawning. The spring chinook use the upper main channel of the Cowlitz River and particularly the Cispus River for spawning. The Cispus River enters the Cowlitz above the head of the Mossyrock Reservoir site. About 96 percent of the spring chinook spawn above the Mayfield site. The fall chinook almost entirely spawn in the main stem of the Cowlitz and in its larger tributaries, namely, main Cispus, Toutle and Coweman. About 47 percent of this species spawn above Mayfield. The silver salmon spawn in the Tilton, Cispus and Toutle Rivers and many smaller tributaries of the Cowlitz. About 78 percent of the silvers spawn above Mayfield.

The steelhead trout do not use the main stem of the Cowlitz for spawning, because they prefer the clearer water in the tributaries. They do not ascend as many small tributaries as the silver salmon do, steelhead preferring the larger streams. There is much yet to be learned about the sea-run cutthroat

trout. In general, however, their habits are comparable to those of the steelhead trout.

A suitable spawning area for salmon must be biologically and physically accessible with respect to water temperature, and the river bed must be composed of rubble larger than pea gravel and boulders less than six inches in diameter. The depth of water should range between 1.5 and 12 feet, the velocity of water over beds from 1 to 3.5 feet per second, and water must move through the gravel, which must be somewhat loose so as to provide oxygen to the incubating fish eggs.

The steelhead trout, and presumably the cutthroat trout also, spawn in suitable gravel where there is a good flow of water through gravel and where it is well aerated.

The smelt use fine pea gravel and very coarse sand for spawning in depths of water varying from two or three inches to six or eight feet. They prefer a stream which has in its source water some glacial silt. The smelt migrate up the Cowlitz for about 15 or 16 miles from its mouth to approximately Castle Rock and they use this stretch of the lower part of the river for spawning.

The spring chinook salmon first enter the Cowlitz River in late March and continue to migrate up the river well into June. They reach their spawning time in mid-August or later. After the spring chinook reach the spawning grounds in May and June,

they lie in cold water until August before they begin to spawn, and continue to spawn into mid-September.

The fall chinook salmon usually first enter the Cowlitz River in the latter part of August, and may continue such migration into early October. The spawning process begins about as soon as the adults reach their spawning area, reaching a peak early in October.

There are two distinct races of silver salmon. The "early run silvers" proceed up the Cowlitz River at about the same time as the fall chinook, early in September and reach their spawning peak in mid November. The later run begins to enter the Cowlitz River approximately the 1st of November and continues to migrate up the river into January with spawning following the migratory run immediately and extending into February. There are also several races of steelhead trout. The winter-run race enters the Cowlitz River between November and April as sexually mature fish, and spawning takes place from the latter part of December to March and April. The summer run and spring run races of steelhead trout are not sexually mature when they enter the Cowlitz River, and they stay in the streams until the following winter and early spring before sexual maturity is reached and spawning takes place. Of the three runs of steelhead the winter run is the largest, being from 60 to 80 percent of the total.

The sea-run cutthroat trout runs take place throughout the summer and the last runs come late

in November. They go back seaward and reenter the Cowlitz to spawn in the spring.

The smelt run in the Cowlitz River in December and January when spawning takes place and the eggs stay in the gravel and water from February to late April.

After hatching, the spring chinook fingerlings generally remain in fresh water for a period of over a year and then go to sea during April and May of the second spring. Some, however, feed for about three months and then go to sea.

The fall chinook, which has spawned in October, hatches in winter and, for the most part, feeds for about three months and then migrates to the sea during the high water of April and May.

The silvers, for the most part, after hatching, remain in fresh water for over a year and then migrate to sea during the second spring. To some degree, however, silvers migrate during the first spring after hatching.

The steelhead trout fingerlings spend approximately the first twenty months in fresh water and migrate to sea during the second spring. Adult steelhead, after spawning, begin going back to sea, and they may be seen going downstream while others are spawning in the winter and spring.

The cutthroat trout fingerlings spend two years in fresh water and then migrate to sea, presumably in the spring. The adult cutthroat trout spawn in the spring and then return to the sea.

The smelt hatch during the spring, but the record does not show how long they remain in fresh water before going to sea.

It may be observed from the foregoing that the Cowlitz River is in use by the adult and infant fish throughout most of the year, which would eliminate the possibility of releases of water from any power project which would take care of the fish in large part at any particular month or during any particular season.

Logging activities have increased the rapidity of water run-offs during the spring when heavy rains occur. Consequently, as a general proposition, the streams run lower in the summertime than they did before the coming of man, and this reduced flow is deleterious to those species of fish which reside in the streams during the summer. Damage due to logging as it may affect runoff, however, is not of much consequence on the Cowlitz River. There are no irrigation diversions or industrial operations above the Longview-Kelso area changing the flow pattern of the Cowlitz River so as to adversely affect the productivity of anadromous fish. Although there are no dams on the main Cowlitz River now, should dams be constructed in accordance with the plans of the Applicant, such dams would change in some measure the present ecology[2] of the river, in that it is expected that some physical and chemical changes would take place in the natural environment which

[2] Ecology: The branch of biology which deals with the mutual relations between organisms and their environment; bionomics.

may affect the population of plants and animals that live in the environment.

On one tributary of the Cowlitz a log jam blocks one fork and on another fork the water is toxic, making it unsuitable for fish. These conditions affect adversely the fish producing capacity of the stream, if otherwise usable, but they are correctible if circumstances indicate a need. Correction of this type of condition is contemplated by the Lower Columbia River Fisheries Program.

Certain types of organic pollution are beneficial to fish life in that they provide a desirable ecological balance in the stream. Other types of pollutants, such as heavy metals, actual toxic materials and waste products due to lumber, pulp or paper operations are deleterious to fish. The presence of pollution at the mouth of the Cowlitz, which is now under study, has affected, and will continue to affect to some extent, the productivity of fish, as it results from pulp waste. Dilution of such harmful pollution as may exist by better regulation of flow would be beneficial to productivity of anadromous fish on the Cowlitz River, but the extent of such a benefit would be almost impossible to ascertain in advance.

National obstructions and conditions such as impassable falls, log dams and swift currents close off certain spawning grounds to anadromous fish. The effect of these has been to keep the actual productivity of the Cowlitz River somewhat below the productivity of which it is capable.

The fishery facilities proposed by the Applicant on the Cowlitz River at Mayfield and Mossyrock Sites for passing upstream migrants.

(1) Handling upstream migrants during the construction period

During the period of construction the City proposes to pass the upstream migrants through a diversion tunnel in each of the two dams. The diversion tunnels at Mayfield and Mossyrock dams will be 460 feet long and 1510 feet long, respectively.

During the construction of Mayfield dam the natural stream will be unwatered for a period of only three or four months, that is, July to October, when the flows are normally low. The tunnel will be designed so as to run partially full of water during the normal summer flows and with velocities low enough for passage of upstream migrants. During the period of filling the Mayfield reservoir, the City plans to pump water into the fish ladders to attract the fish into them, trap the fish and haul them above the dam. The record indicates that the problem of handling upstream migratory fish during construction of Mayfield dam could be satisfactorily solved, and even if substantial losses occurred during this relatively brief period, such losses could be overcome by later transplantation and reestablishment of the impaired run.

During the construction of Mossyrock dam the problem of handling upstream migrants would be a more serious one. The diversion tunnel would be

much longer, and the river would be blocked for a period of about eighteen months. The upstream migrants might be able to pass through the velocities in this proposed tunnel during the period of normal flow. However, the particular objection of the Interveners has been the distance to be traveled in darkness without resting pools, and against excessive currents during periods of high flow. Witness Barnaby of the United States Fish and Wildlife Service testified that the velocity in the Mossyrock tunnel should not exceed three feet per second. Exhibit No. 63 in this case shows that flows with velocities of less than three feet per second will prevail at the edges of the tunnel when as much as 10,000 cubic feet per second is passing through the tunnel. This flow is exceeded only about 7 percent of the time. If further tests showed the desirability of lighting the tunnel, there appears to be no engineering reason why this could not be done.

During periods of flow in excess of 10,000 cfs., and during the period of filling the reservoir, the City would utilize the fish ladder so as to attract the upstream migrants to a point where they could be trapped and hauled above the dam. *It cannot be determined from the record (or from any other source at this time) to what extent the upstream migrants would be likely to use the Mossyrock diversion tunnel.* However, an interim process of trapping and hauling would promise some insurance against undue losses. If the fish passage facilities to be installed as permanent fixtures could be shown to

promise satisfactory permanent results, temporary losses due to dislocation during construction could be tolerated.

(2) Upstream fish-passing facilities for use during the operating period

The City proposes to construct fish ladders at the Mayfield and Mossyrock dams for passing the upstream migrants from tail water to head water. The ladder at Mayfield would be 185 feet in height and the one at Mossyrock 325 feet in height.

The facilities proposed for installation at the Mayfield site contemplate a collecting flume across the front of the powerhouse with an opening to the fishway at each end of the powerhouse with sufficient velocity discharge for the attraction of fish. A fish barrier would be located immediately above the powerhouse to prevent any fish from ascending the stream above the powerhouse and to divert the fish into the collection system of the fishways. The fish ladders would consist of a series of pools, each one foot in elevation above the preceding one, and would be four or five feet deep with a weir at the lower end, with one foot of water flowing over the top. The pools would be about 16 feet long. Resting pools would be provided at various points of the ladders.

The facilities proposed for installation at Mossyrock contemplate a fish barrier located at the upstream end of the powerhouse for the purpose of diverting fish into a fish ladder of similar design as

the one at Mayfield. Sufficient velocity discharge would be provided at the entrance to the fishway for attraction of fish. In order for the fish to enter the Mossyrock reservoir at various pool elevations (because this reservoir has a maximum drawdown of 100 feet) the Applicant contemplates as one method, five passageways or tunnels running partially filled through the upper portion of the dam at each 25 foot elevation above elevation 650, so that the maximum distance of passing the upstream migrants down into the reservoir by means of a smooth, watered chute or slide would vary from 0 to 25 feet.

If the ladder method of handling upstream migrants were to be found to be unsuccessful in actual practice, the City proposes another alternative method, i. e., trapping and hauling similar to the installation made by the Corps of Engineers at Mud Mountain Dam, Washington, or a combination of ladders and hoist. Fish locks such as are proposed at the McNary Dam might also be used.

The plan of the City, proposing the use of fish ladders, was strongly opposed by the witnesses for the Interveners. An analysis of the testimony on the various features of the proposed facilities would be appropriate herein:

(a) The fish rack or barrier

The fish experts who appeared on behalf of the Interveners questioned the adequacy of fish racks. This testimony was based principally on the experience with racks on other streams, particularly the

Balls Ferry Rack in Sacramento River below Shasta Dam. The evidence indicates that in most instances the racks were not properly designed to withstand high flows. One witness testified that if the racks are properly constructed, the loss of fish will be small. Most of the criticism concerning the racks was directed to their use during the period of construction when the river flow is uncontrolled. In this connection, Dr. Hubbs suggested that the rack should have movable sections to permit the fish to pass during construction. After the project is in operation, the river would be controlled and the racks would be subject to floods or heavy debris only on very rare occasions. Regulated flows in excess of 10,000 cfs. at Mossyrock dam would prevail only about 2 percent of the time, based on the flow period of record. The Staff contends that, from an engineering standpoint, it is inconceivable that a fish rack could not be adequately designed to withstand the flows that would occur at the racks. In any event the fish racks could be tested by model study before actual construction and installation and do not seem to offer an insuperable problem.

(b) The fish ladders

The testimony of the fish experts for the Interveners indicates that the fish ladders at the Mayfield and Mossyrock dams would not prove successful, particularly because of their extreme height. To date, the highest dam that has been successfully laddered in this fashion is Bonneville Dam, which re-

quires ladders only 65 feet in vertical ascent. The principal objection of the fish experts for the Interveners is that the fish arriving at Mayfield and Mossyrock dam sites will be greatly weakened due to their advanced sexual maturity and therefore would not have sufficient stored energy to climb the ladders with resulting failure to spawn and reproduce. There might also be considerable delay in finding the ladders. Witnesses Barnaby and McKernan testified that the salmon would expend more energy in going up the ladders and through the pools than they would by traversing the same stretch of the natural river. This testimony was disputed by Dr. Hubbs, fish biologist for the City. The testimony of several witnesses for the Interveners indicates that it would take at least a life cycle of four years to determine whether the upstream migrants which successfully negotiated the ladders had failed to spawn and reproduce. They recommended, therefore, that the ladders be tested over several life cycles of the various species of fish on some other streams. The Staff points out that the record does not indicate what comparable dams are available for such testing or who would bear the considerable expense involved in such a test. The fact that such testing would be expensive and that dams may not be available for conducting such tests does not alter the fact, however, that this method would be the most practicable one for determining in advance whether the fish ladders of such a height would actually work.

The testimony of Dr. Hubbs, fish biologist for the City, recommends that a combination ladder system and hauling system be adopted for passing upstream migrants over the dams. The hauling system would be used for handling the fall chinooks and the ladder for the spring chinooks because the probability of the fall chinooks climbing the ladder would be less since they are nearer sexual maturity. However, it was his opinion that the fall chinooks would also successfully climb the ladder although he had no detailed evidence physiologically or by observation which would support his opinion to the extent that it could be relied upon in the absence of actual observation of such a process.

(c) Resting Pools

The testimony of the witnesses for the City and the Interveners is at considerable variance with regard to the effectiveness of resting pools in the proposed ladder. The Interveners claim that resting pools should not be included in a ladder because the salmon would come to rest therein and might fail to proceed to the top of the ladders. On the other hand, the City's witness, Dr. Hubbs, claims that resting pools are desirable to permit the salmon to recuperate strength in ascending the ladders. He testified that salmon take advantage of resting pools in natural streams. He also testified that additional advice and experimentation is desirable. With this latter observation the Examiner is heartily in accord.

(d) The attraction of fish into the ladders

Several witnesses for the Interveners who have had considerable experience in the salmon field, testified that the delay encountered in finding the entrance to the proposed fish ladders would have a serious effect on the salmon and might result in mortality of the fish before reaching the spawning grounds. Dr. Hubbs, the sole expert for the City on this subject expects that losses due to delay in finding the ladder would be small. The testimony requires the conclusion that the information on this subject is meagre, and extensive experiments would be required to (1) determine the number and exact locations of the entrances to the fish ladders, and (2), to establish the velocities necessary to attract the fish. In this connection the City indicated its willingness to give this matter further study, but after a license is issued. This study period would consist of the relatively short period between the date when basic construction of the project would commence and the date the ladders would be installed. The City would be willing to provide sufficient entrances to the ladders at the locations recommended by the fishery interests.

(e) Passing upstream fish into Mossyrock Reservoir

A proposed method of passing the upstream migrants into the Mossyrock reservoir at various elevations and drawdown consists of five passageways through the upper portion of the dam at each 25-foot

elevation above elevation 650 so that the distance through which the upstream migrants would pass in moving from the ladder to pass into the reservoir would vary from 0 to a maximum of 25 feet. The fish would be expected to slide down a smooth watered chute. Witness Barnaby for the Interveners testified that passing fish down into the Mossyrock reservoir in the manner proposed by the Applicant would be likely to injure the fish. Dr. Hubbs, fish expert for the City, testified that with proper experimentation the chute could be designed to pass the fish safely into the reservoir, and probably this view is more acceptable although the guesswork aspect at this stage is very apparent.

(f) Trapping and hauling upstream migrants

There is an alternative method for passing the upstream migrants over the high dams in the event of failure of the ladders, and this consists of trapping and hauling. The method proposed by the Applicant would involve the passing of the upstream migrants into a ladder, there trapping them, and then having the fish hauled and released at some point above the uppermost dam. There is evidence in the record indicating that this method has proved to be reasonably satisfactory at Mud Mountain Dam, Washington, a flood control project constructed by the Corps of Engineers, although qualitative figures on fish deaths occurring after their release due to injuries incurred in handling are not available. The 1948 report of the Washington State Department of

Fisheries and Game on the Cowlitz project states that trapping and hauling fish would be reasonably efficient, and that no significant damages are expected to result from such an operation. This method of passing upstream migrants over dams is being used at other projects and is planned by Washington State Department of Fisheries for passing fish over Tumwater Falls in connection with the Deschutes River Project, Washington. Witness Barnaby for the Interveners testified that in his opinion if the public interest requires immediate construction of dams on the Cowlitz, the best method would be to trap and haul the upstream migrants.[3]

The Fishery facilities proposed by the Applicant on the Cowlitz River at Mayfield and Mossyrock Development for passing downstream migrants.

(1) During the Construction Period

At each of the proposed dams the City would construct large diversion tunnels to pass the river flow during the construction period when it is necessary to unwater the riverbed or during other phases of construction. The downstream migrants during this period would have to pass through these tunnels. During low flows these tunnels should offer no particular hazard since the water velocities would be low and a good share of the fingerlings apparently go downstream at night. During high flows, espe-

[3] But "The consensus seems to be that less damage by abrasion would occur and a much higher proportion of successful crossing of the dam would result if mechanical means (trapping and hauling procedures) were not used." See Applicant's Exhibit 10, Appendix, pp. 2 and 4.

cially at the Mossyrock tunnel which would be in operation for about eighteen months, the fingerlings which migrate downstream would probably be subject to a somewhat greater hazard in passing through such tunnels. Stream flow records, however, show that during the spring months of April and May, when the bulk of fingerlings migrate downstream, the river flows exceeded an average monthly flow of 12,000 cfs., only on two occasions during the 39-year period of record (1908-1946). A flow of 12,000 cfs. would produce a velocity in the Mossyrock tunnel of about 13 feet per second which should not be detrimental to the fingerlings. The record indicates, therefore, that the problem of handling downstream migrants during the construction period could be adequately solved.

(2) During the Operating Period

The downstream migrant fishery facilities proposed for use after construction of the dams consist of means of screening the water before it enters the intakes to the powerhouse and of passing the fingerlings hydraulically from headwater to tailwater. At Mossyrock, the fingerling system consists essentially of fish intakes adjacent to the turbine entrance screens, water passages to direct the water containing the fingerlings into the dam and thence into collecting chambers for subsequent depressurizing and releasing into fish ladders for passage downstream. A similar system, except for screening of flows, is also provided at higher levels in the dam above the turbine intake levels.

The collection chamber would contain a fish screen to prevent the fingerlings from passing through the conduit system into the turbines. This screen was the subject of considerable testimony by the Interveners' witnesses who claim the screen would clog due to debris or would cause injury to the fingerlings. The fingerling entrance ports were also the subject of considerable testimony because the opponents did not believe the fingerlings would be able to find or use them, especially in the upper levels of the dam away from the turbine intake entrances. Testimony with respect to the chances for a successful operation of these ports was quite conflicting in that some expert testimony indicates that they would work satisfactorily, while other witnesses assume that the fingerlings would have to be very close to a port before being attracted.

At Mayfield there would be no collection chamber or depressurizing of the fingerlings. They are to be screened in front of the turbine intakes and passed directly into a fish ladder for descent into the natural channel below the dam.

The preliminary hydraulic design of the fingerling system at Mossyrock is such that flows through it can be varied over a considerable range to accommodate the various fish habits which might be encountered.

(3) Passage of larger fish through the downstream dam

The water passages through the downstream fingerling system are sufficiently large to pass the

adult steelheads and trout which migrate downstream after spawning. Whether or not these fish would actually use such facilities is not known, and this question cannot be answered in advance, unless a full scale model is employed.

(4) Screening of intakes to turbine entrances

The entrances to the Mossyrock turbines constitute large areas located at considerable depths in the reservoir. The problems of keeping these screens clear of debris and fish would undoubtedly entail great difficulty in design, construction and operation.

At the Mayfield dam the fish screens would be closer to the surface and the serious problem of design, construction and operation would prove easier of solution (if the problem is capable of any solution whatever).

The Applicant and the Interveners conducted inconclusive screen model tests to determine the rapidity of clogging. The Applicant found that the water at the intakes of the Alder dam (where its tests were conducted) carried little debris, while the Interveners' test indicated that the water passing through the Baker River power plant carried sufficient debris to require the screens to be cleaned after three to five days of operation. A similar cycle of cleaning on the proposed dams would entail great maintenance costs if the cleaning were done as frequently as necessary, due to their excessive depth. There is no real evidence of any kind to indicate what might be expected on the Cowlitz River with

respect to debris which might clog fish screens, particularly the ones in front of the turbines at Mossyrock. There is also no evidence which might indicate the economic consequences which would result from frequent cleaning of the screen. The Staff says that it is inconceivable that such maintenance could materially affect the economics of the proposed development. The real dangers lie in the possibility that (because clogging of the screens will not be observable), the operators would not clean the screens as often as desirable, and in the possibility that such cleaning would not be practicable because of depth.

(5) Predatory fish

There was some testimony that predatory fish would congregate in the vicinity of the entrance ports in the collection chambers, and in the fish ladders and feed on the fingerlings while they were passing through the system. This testimony did not establish that such losses would exceed those which occur in nature due to the same predators. Also, since the fingerlings apparently migrate chiefly at night and since the predators feed by sight, there is no reason to expect a decimation of fingerlings which could be attributed to improvement of predator conditions.

(f) The fishery conservation practices, projects and facilities proposed by Applicant

In connection with this proposed project, the Applicant has suggested certain means that it would undertake to conserve the fishery resources of the

Cowlitz River. These are presented under the following topics:

(1) The laddering of natural obstructions and falls

The Applicant proposes to provide laddering or other suitable means to pass salmonoid and searun trout over natural obstructions and troublesome falls. Interveners opposed to the Applicant noted that the Lower Columbia River Fisheries Program includes the same stream improvement matters, and suggests that nothing new would be added by the Applicant. The Lower Columbia River Program is discussed in considerable detail in this decision, and, to the extent that the Applicant's program would provide facilities which would not be expected to be undertaken under that program, it would of course be an additional benefit. Obviously, if the Applicant finances any or all of the stream improvement program, it would be making a definite economic contribution to the Lower Columbia Fishery Program. The proposals of the Applicant in this respect, however, are so vague and indefinite at this time as to not be susceptible of evaluation.

(2) The provision for fish-hatching facilities

The Applicant, if permitted to develop the Cowlitz sites for power, would provide such fish hatcheries as may reasonably be necessary for the purposes of the Cowlitz project. To the extent that such hatcheries are in excess of those proposed in the Lower Columbia River Program as it relates to the Cowlitz River, they would of course be definite im-

provements. Further, if the Applicant participated in the costs of such fish hatcheries, it would be making a definite contribution to the fishery program, thus relieving to some extent the burdens upon State and Federal funds for that purpose. But if the offer of the Applicant, which is too indefinite to be weighed for the purposes of this decision, were merely to replace what it would destroy in the way of fishery resources, there would be no particular benefit to the fishery program. No specific offer by the City has been presented and the matter of the City's proposal to provide additional fish hatcheries should be crystallized. It should be noted, however, that the record states again and again that fish hatcheries, no matter how plentiful, do not appear in themselves to be capable of preserving or replacing the total natural fish productivity of any stream. This is due in part to the fact that the rearing of fish by artificial methods is attended by some unavoidable losses attributable to disease and injury arising from the confining and handling of the immature and relatively delicate young fish.④

(3) The Increase in spawning area above and below Mayfield

The increase in spawning area above Mayfield would be attributed to laddering of obstructions now blocking fish migration and the removal of material and other obstructions blocking migration in

④ The Army Engineers have planned fish ladders and locks for McNary Dam because the Lower Columbia River Fisheries Program cannot maintain the fish run independent of present upstream migration.

varying degrees which is the same kind of activity proposed by the Fish and Wildlife Service in its long range Lower Columbia River Fishery Program. There is not sufficient evidence in the record to show whether Applicant's plan would provide additional spawning area above Mayfield in addition to that contemplated in the Lower Columbia River Program. This feature would merit further study only if there were a reasonable chance that the spawned infants could ever get to the Pacific Ocean through the two dams.

There would definitely be some increase in spawning area below Mayfield if the minimum flow were increased from 1,092 to 2,000 cfs., but the amount of such increase has not been determined. The gain in spawning area below Mayfield which might result from increasing the flow from 1,550 cfs. was estimated by the Interveners to be 65,070 square yards. It might well be, due to riverbed contours, that the gain in spawning areas in the riverbed effected by increasing the flow from 1,092 to 1,550 cfs. would be in the order of 120,000 square yards. Further studies would show the actual gain, but it must be remembered that merely increasing water flow or depth would not necessarily increase the spawning area if additional gravel beds were not provided, and the organic matter which is deleterious to spawning fish were excessive.

It has been suggested that the gain in spawning area below Mayfield resulting from the increased

minimum flow of 2,000 cfs. would not be of practical value because of the adverse effects of daily variations of flows due to power operations. As the Cowlitz smelt ran into the Lewis River during 1949 and 1950 below the Ariel hydroelectric plant which is operated as a peaking plant with resultant fluctuations and flows, the effect of variations and flows on smelt, at least, does not appear to be adverse. Power operating and load curve studies show that it is not necessary to run the Mayfield plant for peaking and it could be run at constant loads if necessary.[5] Further, it was suggested that there would be a change in temperature and chemical content of the water with additional adverse effects which would more than offset the gains in spawning area. Based on the record, however, it is difficult to analyze the claimed adverse effect of temperatures and chemical content changes because of the benefits therefrom as experienced on the Sacramento River below Shasta and Keswick developments and on the Skagit river below Gorge, Diablo and Ross hydroelectric developments. Those benefits are attributable to the colder water provided from the reservoirs during the summer and fall months. A like situation might exist if the Mayfield and Mossyrock developments were constructed.[6]

In short, the gain in spawning area below Mayfield would be somewhat beneficial to those particular

[5] The Staff's recommended order does not, however, contain such a requirement or a reservation of the authority to require such operation in the future.

[6] It is said that the discharge of cold water below the Hoover Dam has made an excellent trout stream of the Colorado, even in the desert.

species which normally spawn below that point, but would probably be of little value to the 96 percent of the spring chinooks, 78 percent of the silver salmon and the 47 percent of the fall chinooks which normally spawn above the sites. There is nothing in the record to establish conclusively that if the dams were built as planned, water temperature or chemical conditions in the river below Mayfield would be adverse to such anadromous fish as are accustomed to use that portion of the river at the present time.

(4) Pollution Abatement below Mayfield

It has been shown by the record that pollution of the harmful type exists on the lower Cowlitz River near its mouth. Although the record does not show whether such pollution is in lethal concentrations, it is to be expected that, with the growth of industry in the lower Cowlitz River, harmful pollution could be so serious if not prohibited by State legislation as to require considerable investment in remedial facilities. An increase in minimum flows from 1,092 cfs. to 2,000 cfs. would be a definite contribution by the Cowlitz project to pollution abatement, but such contribution cannot be properly evaluated in advance.

(5) Spawning Areas in the Cowlitz Project Reservoirs

Data in the record indicate that the Mayfield Reservoir would flood out 116,400 square yards of existing spawning area and Mossyrock Reservoir 298,-265 square yards, the total being 414,665 square yards. In the Mayfield Reservoir there would be 200 acres with a submerged depth of less than ten feet.

The amount of the area so submerged that might be suitable for spawning is probably negligible because although salmon have been observed spawning in depths up to twelve feet, temperatures, gravel size and flow conditions were suitable.

The area to be inundated by the Mayfield and Mossyrock Reservoirs is accountable for 90,571 pounds (933,717 pounds times 9.7 percent) of fall chinook corresponding to 6,378 fish. With improved flow conditions and greater spawning area below Mayfield, it is expected that some of the loss of fall chinook resulting from the flooding of spawning areas in the reservoir sites would be offset to some extent by gains below Mayfield. The extent of offset might be estimated with greater accuracy after completion of long-term studies of gain in spawning areas below Mayfield which would result from increasing minimum flows from 1,092 to 2,000 cfs.

The Applicant proposes certain conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River as discussed above. Such proposals and the effects thereof are not sufficiently detailed, however, to permit any appraisal of their effectiveness. While the attitude of the City is commendable and the Fish and Wildlife Service and the State agencies would undoubtedly welcome aid from any source, it is questionable whether any activity of the City along the lines proposed would completely offset the loss of fishery resources consequent to the erection of the proposed dams.

No. 13289

United States Court of Appeals
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent,

CITY OF TACOMA,

Intervener.

BRIEF OF INTERVENER CITY OF TACOMA

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BRIEF OF INTERVENER CITY OF TACOMA

JURISDICTIONAL STATEMENT

This is a proceeding under Section 313 (b) of the Federal Power Act (16 USCA 791a *et seq.*) to review an order of the Respondent Commission, issuing a license to the Intervener City of Tacoma to construct, operate and maintain a water power project on the Cowlitz River (a tributary of the Columbia) in Lewis County, Washington.

The jurisdiction of the Commission over such project and to issue a license therefor is conferred by Sections 4 (e) and 23 (b) of the Act.

The Intervener on August 6, 1948, pursuant to the provisions of Section 23 (b), filed with the Commission its

Declaration of Intention to construct such project. After investigation and notice to the State, the Commission on March 8, 1949, made and entered its findings and order that the construction, operation and maintenance of such project would affect public lands or reservations of the United States and the navigable capacity of the Cowlitz River and the interests of interstate and foreign commerce, and that such project was under its jurisdiction, and directing that before commencing construction the Intervener obtain a license from it so to do. (R. 539). It is the order, dated November 28, 1951, issuing such license that is here for review.

No challenge has been made to the Commission's basic determination of jurisdiction, and the same is not an issue here.

STATEMENT OF THE CASE

We think a more complete and counter statement necessary. It will to a great extent answer Petitioners' contention that the Commission's Findings are not supported by substantial evidence. We will follow generally the same headings as used by Petitioners.

The Parties

The State of Washington is not a party to this proceeding. The two State Departments of Fisheries and Game were interveners before the Commission and are Petitioners here. The Attorney General, acting through designated special assistants, appeared in their behalf before the Commission in opposition to the project. The Attorney General also, acting through another special assistant, appeared before the Commission in behalf of that segment of the people of Washington, substantial in number, favoring the

project. He was thus through his special assistants on both sides of the controversy, and the State as such on neither. This he is permitted to do under the laws of Washington. *Reiter vs. Wallgren,* 28 Wn. (2d) 872, 184 P. (2d) 571.

The State Departments have no standing for review under Section 313 (b). If Chapter 9, Laws of 1949 is superseded by the provisions of the Federal Power Act, and invalid, the two Departments and their representatives are here merely under color of office.

Petitioner Washington State Sportsmen's Council, according to its own statement, is a non-profit organization of residents of the State of Washington "dedicated to the preservation and protection of the resources of the State of Washington and their recreational value". It has no statutory or official functions and its members have no more or different interest in the resources of the State than its citizens generally. It is not a "party aggrieved" by the Commission's order.

Petitioners on page 3 of their opening brief refer to the Commission as an "administrative body". This is an error. The Commission is rather a "legislative agency". In issuing the license here challenged it acted as the agent of Congress, and its act in so doing was a legislative act. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143; *U. S. ex rel Chapman vs. Federal Power Commission,* No. 28 and 29, October 1952 Term, U. S. Supreme Court, decided March 16, 1953.

Intervener is a municipal corporation and city of the first class of the State of Washington. It is, along with other cities and towns of the State, granted power under RCW 80.40.010 *et seq.* to engage in the generation, transmission and distribution of electric energy for heating, lighting,

fuel and power purposes within or without its borders. This grant of authority has not in any way been modified or amended. It remains unchanged, except for such effect, if any, as the passage of Chapter 9, Laws of 1949, which makes no reference to municipalities or their powers, may be determined to have thereon.

The Proposed Project—Its Scope and Importance

The proposed project includes:

(1) A 185 foot high, 850 foot long dam near Mayfield at about Mile 52 on the Cowlitz River; a 13½ mile long reservoir with a storage capacity of about 127,000 acre feet, a drawdown of 10 feet and useable storage of 21,000 acre feet; and a power house with an initial installed capacity of 120,000 K.W. in three units, with provision for a fourth unit of 40,000 K.W.

(2) A 325 foot high, 1300 foot long dam near Mossyrock at about Mile 65 on the Cowlitz River; a 21 mile long reservoir with a storage capacity of 1,371,860 acre feet, a drawdown of 100 feet and useable storage of about 823,620 acre feet; and a powerhouse with an initial installed capacity of 225,000 K.W. in three units, with provisions for a fourth unit of 75,000 K.W.

(3) Fish ladders, traps, hatcheries and other fish handling facilities and protective devices.

(4) A transmission line approximately 58 miles long leading from said power plants to Tacoma, with substations, switchyards and appurtenant facilities. (R. 553-55).

The estimated cost thereof is approximately $142,000,000, including over $7,000,000 for such fish handling facilities. (R. 545). The project would increase the

present combined total installed capacity of all plants in the Pacific Northwest by approximately 10%. Its estimated capacity when completed is 460,000 K.W. as against a present total installed capacity in the region of 4,700,000 K.W. (R. 524).

Because of its nearness to the heavy load centers west of the Cascade Range and the diversity of rainfall and run-off between its location and the watershed serving the main Columbia River plants it will fit more advantageously than any other prospective plant into Pacific Northwest power pool requirements. (R. 524).

The electricity which can be produced and made available to the City and the Pacific Northwest by the project will retail at approximately $10,000,000 annually, even at Tacoma's present record low rates, and all power that can be produced therefrom will be readily salable. The project is self liquidating and economically, financially and engineeringly sound. (R. 4260).

In addition to its power advantages the project possesses large navigation benefits, equivalent to six inches channel dredging in the lower Cowlitz River, and flood control benefits sufficient to reduce the maximum flood of record on the Cowlitz by 50%, and to confine the river to bank full capacity. It also has prospective recreational benefits from the reservoir lakes which would be created. (R. 540).

The only detriment to flow from the project would be some possible fish losses. According to the State Departments' own estimate, as contained in Exhibit 25, three-fifths of the fish resources above the dams can be maintained through trapping and artificial propogation in hatcheries, and with intensive propogation it may be possible to main-

tain the whole. If the City's proposed new fish handling facilities prove out, an increase in fish production is possible. (Ex. 8, R. 386).

Conflict between State and Federal Laws

This conflict clearly exists. Chapter 9, Laws of 1949, prohibits outright the construction of any dam over 25 feet in height on the Washington tributaries of the Columbia River below McNary Dam. The Federal Power Act, Section 10 (a), authorizes and encourages dams and other works where "in the judment of the Commission" they are "best adapted" to a comprehensive plan for improving a waterway for the benefit of interstate and foreign commerce, water power development, and other beneficial public uses. Under the State act no consideration or effect can be given to these beneficial uses and no dam constructed even if it is found to be "best adapted" to such uses. Compliance cannot be had with the State act if effect is given to the Federal one.

As to the necessity of obtaining a permit from the State Supervisor of Hydraulics under RCW 90.20.010 et seq. the situation is the same. The Federal Power Act does not contemplate dual authority with a duplicate system of conflicting permits, and such a system would be unworkable. Further, it is not to be expected that the State Supervisor would entertain an application for such a permit so long as the validity of Chapter 9, Laws of 1949, is undetermined. Petitioners take the anomalous position that Intervener should obtain such a permit as a prerequisite to obtaining a license here, while at the same time asserting that the State Supervisor is without authority to issue such a permit under Chapter 9, Laws of 1949.

It is further not to be expected that the State Departments of Fisheries and Game who now oppose the project would entertain consideration under RCW 75.20.100 of complete plans and specifications for fish handling facilities for the project and grant approval thereof, while at the same time insisting that the whole project is prohibited by Chapter 9, Laws of 1949. The obtaining of such prior approval of fish handling facilities is nowhere made a prerequisite to the obtaining of a Federal License. The proper procedure is that specified in the Wildlife Resources Act of August 14, 1946 (16 USCA 662), and in Articles 30 and 31 of the License here issued to Intervener. (R. 559).

Pacific Northwest Power Situation

There is a dire need for more power in the Pacific Northwest. The Federal Power Commission and National Defense Resources Board Reports show this area to be the most critical in the United States. Water power development is and will continue to be the basis of the economic growth of the region, which has no oil or substantial coal resources, but does possess approximately 40% of the nation's hydro electric power potential. (R. 77).

Because of the power situation the Washington Public Service Commission in 1949 issued an order applicable to the private power companies under its jurisdiction (Ex. 60), directing them to take on no new loads of more than 500 K.W., whether for existing or new customers, nor to take on any space heating loads. This requirement has been continued and, although legally not applicable to publicly owned plants has voluntarily been followed by them. (R. 1266).

The Department of the Interior in a letter, dated October 20, 1949, to the Commission (Ex. 6, p. 6), stated:

> "These studies indicate that the Pacific Northwest region will be able to meet most of its power requirements during the next several years only if water conditions in the rivers are average or better."

The above was written several months before the present Korean situation developed and before the greatly increased need for large additional sources of power for aluminum and other defense purposes. (R. 1376-1378).

The acute power shortage in the region is stressed in statements of the Pacific Northwest Utilities Conference Committee made June 22, 1947, January 6, 1948, and April 14, 1949, in each of which it is urged that the federal agencies expedite their plans for additional generation on the Columbia River. (Ex. 21, sub. Ex. 3, 4 and 5).

The Bonneville Power Administration in its 1950 Advance Program (Ex. 23) gives a comprehensive statement of the federal program and discusses requirements, resources, load growths and other pertinent data necessary to proper planning and development. This statement estimates that in a minimum water year it will not be until 1957-58 that power capability is sufficient to meet requirements. Such exhibit shows that the Pacific Northwest population increased from 1940 to 1949 by 44%, the United States only 13%, and that the estimated increase for 1950 to 1959 is 14% and for the United States only 6%.

The above exhibits show that in order to meet the demands in the Pacific Northwest by 1958, even without consideration of aluminum development and defense needs, it will be necessary to develop the four proposed plants on the lower Snake River, and also Hungry Horse Dam, McNary Dam, Chief Joseph Dam and Hells Canyon Dam,

and the Rosa and Chandler projects. Some of these are still unauthorized and most are very doubtful of early development. So far the tendency has been for these programs to fall behind schedule. (R. 1376).

In view of the present national defense program all of the foregoing estimates must be considered as extremely conservative. Almon D. Thomas, an electrical engineer on the Commission's Staff, in testifying to the estimates contained in Exhibits 52 to 56B, stated that in his opinion the actual load experienced in future years would exceed his estimates, but that he seriously doubted that they would be less. (R. 4131).

On the basis of the Intervener's history its load has grown at the rate of approximately 10% compounded annually even in the face of conservation measures and the refusal to contract for large blocks of power which industries have requested. This means doubling every seven years. (R. 62). Plate 16 of Exhibit 10 shows graphically that using this rate of increase the City will require all of the energy produced from these projects for its own use by the middle of 1956, and at a time when according to the federal program, even if it keeps it's schedule, there will still be a need for additional generation.

The above estimates are made upon the basis of the Intervener now being and hereafter continuing to be a member of the Pacific Northwest Power Pool. If it was not for this pool, the situation would be greatly worsened. The fact that the Intervener, as a municipality, may be legally entitled to a preference in the purchase wholesale of Bonneville Power, affords no relief to the regional situation and no aid to Intervener when there is no power for sale. In the past when programs of curtailment have been necessary, it has been shared in by the municipalities along with others. (R. 1376).

Public Support of and Need for Project

That the segment of the public favoring the project is substantial ,and the benefits to be obtained therefrom great, was further attested by the evidence presented at the public hearing held at Tacoma, Washington, on November 20-21, 1950.

There appeared in support of the project approximately 50 local and statewide labor organizations, representing thousands of members, giving their all-out backing to the project in the interests of personal comfort, convenience, jobs, business and industrial growth, and national defense, and all that these things mean to people. (R. 2541-2597).

Several veterans' organizations, including the American Legion, Veterans of Foreign Wars, Amvets and Disabled American Veterans, also lent their support on the above grounds, particularly stressing national defense. (R. 2615-2630).

Civic clubs, professional associations and commercial interests, including Chambers of Commerce, the Seattle Development League, the Professional Engineers Association, and the General Contractors' Association, not only from Tacoma but from throughout the State, supported the same point of view, particularly stressing power values and needs. (R. 2605, 2630, 2662, 2673).

Business and industrial concerns, including the West Coast Grocery Company, the St. Paul and Tacoma Lumber Company, the St. Regis Paper Company, Pennsylvania Salt Mfg. Co., Hooker Electro Chemical Co., American Smelting and Refining Co., and Port of Tacoma, told of their own and other business and industrial need for power in the Pacific Northwest generally and Tacoma in particular. (R. 2630-2654).

Agricultural interests, through representatives of the State Grange, Washington Farm Bureau, Washington State Development Association and National Reclamation Association; power groups, through representatives of Seattle City Light, the Washington State Public Utility District Association, the Northwest Public Power Association and the Inland Empire Waterway Association; extended their support, stressing the widespread need and overall value of power as compared with other factors in the case. (R. 2489-2540, 2597-2615, 2668).

Residents and officials of the several cities, towns and communities of Lewis County, and along the Cowlitz River both above and below the sites of the proposed dams, made known their desires and presented a petition with over 3,000 names endorsing the project. (R. 2489-2526).

Carlton Nau, General Manager of the American Public Power Association, comprised of some 700 publicly owned electric operating utilities scattered throughout the country, testified that the Cowlitz project had been endorsed by the Executive Committee of that Association. He also quoted from a National Security Resources Board's statement of April, 1950, stressing the importance to national defense of the early development of the project. (R. 1178).

Kinsey Robinson, President of the Washington Water Power Company, a private utility serving territory in eastern Washington, Idaho and Montana, stressed the acute power situation in the Pacific Northwest and testified that his company would be glad to purchase power from the City of Tacoma if it should have the same available for sale. (R. 913).

Opposed to the above were commercial fishery interests, sportsmen's associations, and some commercial and

business organizations residing at Longview and Kelso, Washington, at the mouth of the Cowlitz River, and at Astoria, Oregon, which is the site of the large commercial fishing interests located at the mouth of the Columbia River. Most of these people based their opposition on the contention that the fishing and recreational interests they represented would be hurt. They made no attempt to analyze the comparative values of the other factors involved. (R. 2687-2830).

The Cowlitz River and its Fishery

Despite the statement of Petitioners, the watershed of the Cowlitz River is not in a particularly remote or isolated part of the State. The proposed dams are within 50 airline miles of Tacoma, and 80 of each Seattle and Portland, and only a few miles easterly from main Highway 99 connecting these cities.

The Cowlitz River is an important producer of fish. It is not, however, anywhere near as important as Petitioners claim. For confirmation we turn to a Report prepared by the two state departments in 1948. (Ex. 25).

In the Report (Ex. 25, p. 8) the annual value of the salmon and trout produced on the River above Mayfield Dam (the lower one) is estimated at $571,710 on the basis of the average price paid to fishermen, and $938,983 on the basis of wholesale commercial values, which include costs of buying, hauling, delivery, cleaning, dressing, grading, icing, boxing, canning and freight charges for delivery to market. In the figures are $202,581 and $433,147, respectively, representing the value assigned to the portion of the whole catch constituting the sportsmen's part thereof. Eliminating these sportesmen's catches, the commercial values are $349,129 and $505,837, respectively. Valuing

the sportsmen's catch at the rate per pound assigned to the commercial catch and adding it to the commercial values, the figures would be approximately $395,000 and $570,000, respectively.

Both the Examiner and the Commission found the net dollar value of the fish attributable to the area above Mayfield Dam to be approximately $600,000, and, after excluding strictly recreational value therefrom, $515,000 (Finding 44, R. 549). Both found there would be no injury, and possibly some benefit, to the fish below Mayfield Dam (Finding 48; R. 550).

The species of fish found in the Cowlitz River are Fall Chinook, Spring Chinook, Silver Salmon and Steelhead and Cutthroat Trout. (R. 196). On the basis of past experience it should be possible through artificial propogation to maintain the runs of Fall Chinook and Silver Salmon, representing 60% in value of the above sums. (Ex. 25, pp. 10-11). As to the Spring Chinook and Steelhead and Cutthroat Trout, intensive artificial propogation is suggested as a possible means of eliminating loss, but doubt expressed as to the extent of success to be expected. Assuming no success, the above sum would still be reduced by 60% or to approximately $200,000 annually. But some success has been experienced with these species. With an intensive program it does not seem unreasonable to expect that the loss would be cut in half, or to not to exceed $100,000.

The above gives no effect whatever to the proposed fish handling facilities, other than hatcheries, by the Intervener's engineers and biologists. It is the City's position that its proposed fish handling facilities are worthy of further tests and experimentation and trial, and that there is every probability that they will work. It proposes to spend

$7,000,000 in support of this idea, which is equal to the total value of the fish involved for a period of over 13 years.

But should the proposed fish handling facilities, other than hatcheries, fail, the power values would still far outweigh the fish losses, and to the power values would be added those of navigation, flood control, recreation, and national defense.

The Comprehensive Plan for the Columbia Basin

We believe that this heading, and the material which Petitioners have set forth thereunder is misleading. The problem before the Commission was not the whole Columbia Basin, but the Cowlitz River, which is a separate "waterway". What is its "best adapted" or most beneficial use?

The great decline in the fish resources of the Columbia River occurred long before construction of Grand Coulee and other dams on the Columbia. This is attested by the territorial act of 1877 cited on page 39 of Petitioners' brief. It was passed over 50 years before the construction of Grand Coulee Dam. In the preamble the legislature then declared:

> "Whereas, it is well known that the salmon of the Columbia River and tributaries are rapidly diminishing in numbers to the injury of the public, and threatening if not averted to materially prejudice the interests of trade and commerce, therefor:"

The Army Corps of Engineers' "Review Report on the Columbia River and Tributaries" is comprehensive in that it covers all the individual power sites subject to possible development on the river system. It does not purport to determine the order of their development, or whether by the Federal Government or private or public

interests. It does not direct development of the upper river for power, and preserve the lower river for fish. It deals primarily and basically with navigation, power, flood control and irrigation development.

Historically, the first dam constructed on the river was at the lowest possible site—Bonneville. Recently construction at the second lowest site—The Dalles—was commenced. McNary Dam, well along, is not far up the river, and Ice Harbor, the lowest site on the Snake River, has recently been recommended for construction. The progression of development has been from downstream to upstream, rather than the opposite, and this is understandable. The heavy load centers are in the downstream area.

In the Department of the Army Section 4 (e) Report to the Commission (Ex. 5) the Department says that the Review Report dated 1 October 1948 shows a total of nine potential power sites in the Cowlitz Basin, the two most favorable of which are those at Mayfield and Mossyrock, but that no recommendation is made in the Review Report for development by the Federal Government because of the interest of local agencies (Tacoma) in undertaking such development and because of the need for correlation of such development by local interests with the need for preservation of fisheries resources. If the Army meant that the Cowlitz Project was out of harmony with its basin plan, it did not say so when asked for comment in this proceeding.

The Lower Columbia River Fisheries Plan

This plan was prepared by the U. S. Fish and Wildlife Service and first published in 1947 (Ex. 31). It suggests the expenditure of $20,000,000 over a period of 10 years by the Federal Government, acting through the state

agencies, for rehabilitation of fish resources, to compensate for losses resulting from federal dam construction (Ex. 31, p. 7). The proposed expenditures, other than relatively small amounts for water resource, engineering and biological surveys, are for stream improvements, consisting of laddering 76 falls, screening of diversions, removal of log jams and debris, and for the construction of 28 fish hatcheries. The 76 falls to be laddered and 28 hatcheries to be built are specifically listed, and account for the bulk of the proposed expenditure (Ex. 31, pp. 14-18).

In accordance with the requirements of The Wildlife Resources Act of August 14, 1946 (16 USCA 661 et seq.) this plan was included in and made a part of the 1948 Review Report. In due course the Review Report was approved by the Chief of Engineers and by the Federal Power Commission as constituting a dsirable and coordinated "basic framework" for basin development. Neither approval went further than this (R. 248). The position of the Federal Power Commission in this respect is made clear by its Opinion in this case (R. 528). Congress has not approved either the 1948 Review Report or the proposed fisheries plan. The appropriations which it has made for stream improvements and hatcheries are general in terms and are in no way inconsistent with development of the Cowlitz River. One could easily be favorable to both the appropriations and the development.

This Lower Columbia River Fisheries Plan when originally conceived (Ex. 31) did not include thought of the refuge or sanctuary now proposed, and no reference thereto or to the prohibition of further power development on the lower tributary rivers is made therein. Yet the original plan listed all the items included in the proposed $20,000,000 expenditures. Only a small amount of these

expenditures are planned for the Cowlitz River. It includes two hatcheries, one of which is on the Toutle River which joins the Cowlitz River below the dams, and the other is on the Cowlitz River above the Mossyrock reservoir. These hatcheries could be constructed and used whether the dams are constructed or not. All other items in the plan can go forward and be constructed and serve to the same extent of usefulness as they could if the Cowlitz dams were not built. No item of the whole plan need be changed.

On page 11 of their brief Petitioners refer to the President's Water Resources Policy Commission as specifically mentioning the problem of the Cowlitz, and as agreeing that the integrity of the Lower Columbia River Fisheries Plan should be preserved. The President's Commission in its report does speak of the Cowlitz, but says that the matter was being considered by the Federal Power Commission in this proceeding, and that "Definite conclusions have not yet been reached in this project."

Mr. Barnaby, of the U. S. Fish and Wildlife Service did refer to the Cowlitz River as the keystone of the fisheries plan and say that if the dams were built, the whole plan might as well be abandoned. Mr. Barnaby's feeling and thinking, however, is displayed by his testimony on cross-examination that he felt that if any loss of fish resulted from utilization of the Cowlitz River for power, the dams should not be built and, if they were built, even with that small loss the whole Lower Columbia River Plan should be abandoned (R. 3644). There are 85,000 spawning fish above Mayfield, according to the State Fisheries Department's estimate (Ex. 28, page 6). 5% of these is 4250 or 2125 spawning pair. To save these Mr. Barnaby would forego the benefits of a well conceived and centrally located power plant producing over $10,000,000 retail value

of power annually (R. 4260). Conversely, if he lost this small number of fish, he would abandon all the other fish gains that can be obtained from the important improvements and expansions of the Lower Columbia River Fisheries Plan. We stress this matter because we feel that Mr. Baranby's thinking and his idea of fish values is illustrative of that of other of the fishery witnesses in the case. Their thought is that the construction of the proposed project, no matter how valuable otherwise, is unjustified if it results in *any* fish losses.

The Proposed Fish Facilities

The City's proposed fish facilities include the full hatchery program suggested by the two state Directors in their 1948 Report on the Cowlitz River (Ex. 25). According to the State Directors' statements in that report these hatchery facilities should maintain the Fall Chinook and Silver Salmon runs, and if intensively applied, might sustain the others. Petitioners in their brief see fit to ignore hatchery facilities entirely. They similarly tried to ignore them in the proceeding before the Commission. These trapping, hauling and hatchery facilities would alone eliminate at least three-fifths of the claimed losses, and certainly are entitled to great weight in this proceeding.

In addition to the above the City's engineers and biologists, in order to preserve and possibly increase the reamaining fish, suggest a system of ladders with intermittent resting pools to enable the fish to pass upstream, and a screening and fingerling passage system to enable them to pass unharmed downstream. (Ex. 10, 14).

The ladders are considerably higher than any heretofore constructed, and so are untried in operation. Fish have, however, not failed so far to make their way up what-

ever height of well designed ladder has confronted them. Dr. Hubbs testified that they should consume no more energy in making their way up the ladders and through the reservoir than they do now in traversing an equal portion of a sometimes not too friendly river. (R. 1314). Moreover, in getting adult fish upstream, trapping and hauling in tank truck to a hatchery or point above the dams for release is an acceptable substitute for ladders. (Ex. 25). The two State Directors state that it should result in no significant losses, and that the handling of upstream migrants is not a major problem, but that protecting downstream migrants has always proved an unsurmountable hazard at high dams.

The City's suggested downstream facilities include an extensive screening system, with stout close-mesh screens set at a slant to the flow of water, at the approaches (where the velocity of flow is low) to the intakes to the penstocks leading to the turbines, so as to shunt the downstream migrants away from the intakes and into controlled passageways leading into a collection chamber and through the dam and to safe discharge in the river below. (See Exhibit 14, Survey Report of Dr. Strunk and Dr. Hubbs).

The City's downstream facilities are based on certain observations and studies and known biological laws. The downstream migrants are composed mostly of the young fish or fiingerlings from about 1¼ to 6 inches in length, which remain in the streams for periods, depending on the species, of from a few months to two years after hatching, until compelled by a downstream urge to move to the ocean, there to stay and grow for the period of their cycle, and then return to their original streams to spawn and die. These fingerlings when so moved by such downstream urge largely yield themselves to the current of the stream and

float along helter-skelter, but generally with heads upsteram and tails downstream. When startled they alert themselves so oriented. They thus largely go where the current takes them, and should be shunted off the slanting screens and into the numerous entrance ports to the passageways leading to the collection chamber and through the dam. Mr. Hutchinson, of the U. S. Fish and Wildlife Service, testified to success with such screens at Little Port Walter in Alaska (R. 2425). The Secretary of the Interior, speaking for the U. S. Fish and Wildlife Service, in a letter report (Ex. 8) to the Commission with reference to these facilities said that they were "unique and evidenced considerable engineering ingenuity" and "are based on assumed biological laws, which may also be correct", and that "the Department cannot say that they will not work, since they had not been tried, but neither can it say that they will". He further commented that the plans "provide a unique engineering approach towards solution not only of the problems of the Cowlitz, but also for future conflict between fish and power" elsewhere.

A great portion of the testimony before the Commission was given over to these facilities and the other fisheries problems in the case. They are discussed in the supplement to the Applicant's Exceptions to the Examiner's Report and Recommended Order, pages 340 to 388 of the Record. Various questions raised in connection therewith are there answered under 26 different headings. Reference thereto may be had for further clarification.

The Commission was of the opinion that the City's proposed fish handling facilities were worthy of trial after further test and study in cooperation with the U. S. Fish and Wildlife Service and the State Departments of Fisheries and Game, and made provision therefor in the License, Article 30 and 31 thereof. (R. 559).

The Examiner's Recommended Decision

The Examiner's Recommended Decision (R. 58-149) may be briefly summarized as follows:

1. He finds that the proposed project meets admirably the tests of engineering feasibility, that there is no question but that the City can finance the project, and that there is a more than ready market for the energy output just as soon as it can be produced (R. 70-71).

2. He believes that the proposed facilities for handling migrating adult fish upstream will work with reasonable efficiency (R. 120-121).

3. He has unresolved doubts whether certain important features of the proposed facilities for handling migrating young fish downstream will work (R. 124, 134).

4. He concludes that development of the proposed project will conflict with the Lower Columbia River Fisheries Plan advanced by the U. S. Fish and Wildlife Service (R. 87-93).

5. He argues that various Federal agencies, including the Commission, Congress and the President, have approved and adopted the Fisheries plan (R. 93-106).

This is a key point in his buildup to his final conclusion.

6. He finds that, measured by a monetary yardstick, power, navigation and flood control benefits will greatly outweigh fisheries losses (perhaps as much as eight to one), but concludes that insofar as commercial and sports fishing is concerned a monetry yardstick is difficule to establish and should not be applied. He therefore adopts one of "better living". (R. 134-143).

This again is a key point in his build up to his final conclusion.

7. He reaches the overall ultimate conclusion that no permit for the project should be issued unless conclusive showing is made that there would be either "no deleterious effect" at all on fish resources, or only "relatively minor" effects, or the economic situation was such that power could not be obtained for the Pacific Northwest area by anyone from any other source but the Cowlitz River (R. 70, 106).

The Examiner's findings do not support his conclusions. He errs in his conclusion about official approval of the Fisheries Plan in item 5, in the yardstick he applies to fish values in item 6, and in his failure to apply a common standard of comparative values in item 7. Through his whole report runs the basic error that power, navigation and flood control benefits are to be measured by one yardstick (a monetary one), but commercial and sports fishing by another (better living, wholly intangible and immeasurable).

The Commission's Order

The Commission, after consideration of the Exceptions taken to the Examiner's Recommended Decision by the Applicant (R. 234-387), the Commission Staff (R. 388-437) the two State Departments (R. 438-456), and by the Attorney General for that segment of the public favoring the project (R. 225-232), and hearing oral argument by all parties, corrected the Examiner's errors above indicated. It pointed out that neither it nor the other government agencies or officials claimed had adopted or approved the Fisheries plan, and in the conclusion to its opinion summed up the situation as to the benefits and losses to be derived from the project as follows:

"We are required to consider all of the possible advantages and disadvantages of the City's proposal from the standpoint of the greatest public benefit through the use of these valuable water and other natural resources. The question posed does not appear to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For this reason we are issuing the license with certain conditions which are set forth in our accompanying order."

The Issues Involved

Issues presented are:

1. Are the Petitioners "parties aggrieved" by the Commission's Order?

2. Are the challenged Findings of the Commission supported by substantial evidence?

3. Are the challenged Conclusions of the Commission correct?

Specifiically:

4. Has the City met the requirements of Section 9 (b) of the Federal Power Act by submitting to the Commission satisfactory evidence of compliance with State laws?

5. Are the provisions of Chapter 9, Laws of 1949, of Washington, superseded by the provisions of the Federal Power Act?

6. Are the provisions of said State act prohibiting construction of dams and diversion of waters invalid in part, and being inseparable, said act invalid in whole?

7. Is the subject of said State act, which purports to create a fish sanctuary and prohibit the construction of dams and diversion of water therein, expressed in the title of the act, which is "An Act relating to the protection of anadromous fish life in the rivers and streams tributary to the Lower Columbia River, and declaring an emergency", and does such State act embrace only one subject?

8. Does said act contain an unlawful delegation of legislative authority?

It is Intervener's position that the answers to questions 1 and 7 are No, and to all the other questions Yes, and that this review is not well taken.

SUMMARY OF ARGUMENT

The Federal Power Act was adopted by Congress in exercise of its public land and commerce clause powers, both of which are unlimited, except for the Fifth Amendment. *United States vs. California,* 328 U.S. 18, 91 L. Ed. 1889; *United States vs. Appalachian Electric Power Co.,* 311 U.S. 377, 85 L. Ed. 243.

By the Act Congress set up an all-embracing scheme for promoting and controlling the comprehensive development of the water resources of the nation, insofar as it was within the federal power to do so. It was most strongly desired to avoid any divided or dual authority over any one subject, and the solution reached was to apply the principles of division of constitutional powers between the state and

federal governments. Accordingly, to the states was left their traditional jurisdiction over property rights, and control over all other matters placed with the Commission as the Agent of Congress. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143.

The Federal Power Act supersedes all conflicting state laws providing for water power development of the streams under federal jurisdiction, as well as any other state laws in conflict therewith. The fact that these state laws may be enacted in exercise of the police powers is immaterial. The granted powers of Congress have never given way to the exercise of police powers by the states. The federal law is supreme.

Chapter 9, Laws of 1949, prohibiting the construction of dams over 25 feet in height, and the diversion of waters for any other than fisheries purposes, is in direct conflict with Section 10 (a) of the Federal Power Act, which authorizes and encourages such dams and other works when "best adapted" in "the judgment of the Commission" to a "comprehensive plan for improving" a "waterway" for the "benefit of interstate and foreign commerce", "water power development", and "other beneficial public uses". Here, compliance with the State act is impossible if effect is to be given to the Federal one, and proof of such compliance is unnecessary. It is not required by Section 9 (b) of the Act. *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 177, 90 L. Ed. 1143, 1157.

The situation is the same with reference to the necessity of obtaining a permit from the State Supervisor of Hydraulics. The provisions of the Federal law, as implemented by the License, are extensive and complete, and the State permit could contain nothing in conflict there-

with. To require it would be useless and in all probability unworkable.

The obtaining of approval of complete plans and specifications for fish handling facilities from the State Directors of Fisheries and Game, pursuant to Section 49, Chapter 112, Laws of 1949, as a prerequisite to the issuance of a Federal license is in like category. This statute merely requires such approval "before commencement of work", and it is not to be expected that such plans and specifiications would be prepared prior to obtaining a license. The Wildlife Resources Act of August 14, 1946 as well as Articles 30 and 31 of the License (R. 559) properly provide for final approval of the fish handling facilities by the Commission itself, after consultations with the U. S. Fish and Wildlife Service and the heads of the State Agencies. The City is not to manage the fisheries, but merely to furnish and pay for the fish facilities. Fisheries facilities were held a matter of proper consideration by the Commission in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421, certiorari denied 94 L. Ed. 1383.

The Petitioners, while insisting that the City should obtain such a hydraulics permit, and approval of complete fishery plans and specifications, at the same time maintain that the State officials are without authority under Chapter 9, Laws of 1949, to issue such permit or aproval.

Section 313 (b) of the Act makes the findings of the Commission conclusive if supported by substantial evidence. Here they are supported by the great weight thereof. This appear from the facts set forth or referred to in our counter statement and elsewhere in our brief. Petitioners make no attempt to analize the evidence. They merely refer to items favorable to themselves and largely ignore the rest.

The provisions of Chapter 9, Laws of 1949, are fully superseded by the provisions of the Federal Power Act, and are invalid; and this is so even though the provisions of such act might have been deemed valid if directed only against municipalities. The provisions of the act being inseparable, and the act invalid in part, no longer expresses the legislative intent, or can accomplish its purpose, and is invalid in whole. *Corwin Investment Co. vs. White*, 166 Wash. 195, 6 P. (2d) 607; *Williams vs. Standard Oil Co.*, 298 U.S. 235, 73 L. Ed. 289.

The fact that the City is a subordinate body of the state, and has no privileges or immunities, and is entitled to no protection under the contract and due process and equal protection clauses of the Fourteenth Amendment, has no bearing here. The City makes no claim to any privileges or immunities or rights under said Amendment. The coincidence that the City is subordinate to the State does not change the fact that the Federal law, enacted under the commerce and public land clauses, is supreme, and is binding upon the state and all others alike. Chapter 9, Laws of 1949, never purported to be an act limiting the powers of municipalities. It makes no reference to municipalities or their powers.

Chapter 9, Laws of 1949, is also invalid under the provisions of Article II, Section 19, of the State Constitution, in that the subject thereof, which is the barring of construction of dams and diversion of waters, is not expressed in the title, which relates only "to the protection of anadromous fish life".

Chapter 9, Laws of 1949, is also invalid under Article II, Section 1, of the State Constitution, in that it contains an unlawful delegation of legislative authority.

Finally, the Petitioner Washington State Sportsmen's Council is clearly not a "party aggrieved" by the Commission's Order and neither are the two State Departments.

ARGUMENT AS TO PARTIES AGGRIEVED

The Petitioners are not Parties Aggrieved by the Commission's Order

As pointed out above, the State of Washington is not a party to this proceeding. Its departments and officials through the Attorney General, were on both sides of the controversy before the Commission.

Section 313 of the Act (16 USCA 825 l) specifies who may seek rehearing and review of a Commission Order. It provides (subsection a) that "any person, State, municipality, or State Commission aggrieved by an Order" may apply for rehearing, and confines the right of review to those making such application. This must be construed as confined to those *entitled* to make such application. Each of the foregoing designations are specifically defined in the Act. Section 3 thereof (16 USCA 796). These definitions are:

> "(4) 'person' means an individual or a corporation;"
>
> "(6) 'State' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;"
>
> "(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;"
>
> "(15) 'State commission' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;"

The two State Departments are not the "State". No one or two departments or officials can be that. They can

be, as here, on different sides of the controversy. They are not "persons". They are not "municipalities". That term is limited to designated bodies with a particular function. Neither are they a "State commission". That term is confined to the public service rate regulatory body.

The Wildlife Resources Act of August 14, 1946 (16 USCA 662) specifies the method by which the heads of the State agencies dealing with wild life resources are to submit their views for the prevention of loss and damage to such resources. This indicates that Congress placed the decision on these questions in the Commission, with the State agencies as mere advisors, and that it did not elevate them to the category of parties or possible contestants. Further, the time for final determination and approval of fish handling facilities has not yet come, and these state agencies are to be continually consulted with reference thereto. See License, Article 30 (R. 559). It may well be that the recommendations of the two Departments, short of an arbitrary refusal to approve anything, will be incorporated in the final fish handling plans and specifications.

In both the *First Iowa* case, and in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421, the party seeking review was the State.

Petitioner Sportsmen's Council is a non-profit organization of resident of Washington "dedicated to the preservation and protection of the resources of the State of Washington and their recreational value". It has no statutory or official function and its members have no more interest in the resources of the State than its citizens generally. It is very definitely not a "party aggrieved" by the Commission's Order. *In re Borough of North Braddock,* 190 Atl. 357, 361; *Interstate Electric, Inc. vs. Federal Power Commission,* 154 F. (2d) 495.

ARGUMENT

For convenience, where applicable, we will follow the same subject-matter arrangement as Petitioners, with such change of headings as better expresses our position.

A.

The Commission had full Jurisdiction and Authority to enter its order issuing the License to the City.

Specifications of error 1 through 5 are discussed hereunder.

1. The City is not required to comply with those state laws relating to water power development which have been superseded by the Federal Power Act, or are invalid.

It is true that the State, as trustee for its people, is the owner of the fish in the streams and tidewaters within its boundaries, so far as fish are capable of ownership while running; and that it may regulate and control their taking and killing. But this title and these rights are subject to the paramount rights to regulate navigation, interstate and foreign commerce and public lands, granted to the central government. *State vs. Towessnute,* 89 Wash. 479, 154 Pac. 805; *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298.

Such ownership of the fish does not carry with it the ownership of and the right to control the use of the waters in which they subsist. The Federal Government has complete control and domination over the water power inherent in flowing streams, and is liable to no one for its use or non-use. *United States vs. Appalachian Electric Power Co.,* 301 U.S. 377, 85 L. Ed. 243, 261.

The State no more owns or has dominion over the waters, than the Federal government owns or has dominion over the fish. But when the State's attempt by law to regu-

late or control its fish collides with the Federal government's attempt by law to regulate or control its commerce the supremacy of Federal law must prevail. That is what the provisions of both the Federal and State Constitutions provide. Federal, Article VI; State, Article 1, Section 2.

The passage of the State statutes set forth by Petitioners, pages 32 to 37, cannot be denied, but their applicability and effectiveness can. For the City to proceed is not to disregard these laws, because when they are superseded and invalid they are not laws. Rather, that which supersedes them is the law. These superseded laws declare no policy, and to ignore them is to obey the law, not to defy or disregard it.

2. The fact that the statutes of the State, with which the Petitioners claim the City has not complied, were passed under the State police powers, does not make them valid or applicable.

It is true that the State of Washington has been historically concerned with the preservation of its fish and game, and perhaps not sufficiently. It has also been historically interested in the development of the water power resources within its borders. There is no basis, however, for the statement, which Petitioners make on page 40 of their brief, that the preserving inviolate of the spawning grounds of anadromous fish has been "foremost" in the minds of our legislators from the earliest territorial days.

Petitioners state (p. 40) that the "Sanctuary Act" does not purport to deal in a contradictory manner with anything expressed or reasonably implied in the Federal Constitution or any law passed pursuant thereto, and that at best the "Sanctuary Act" is merely in derogation of the *ruling* of the Federal Power Commission. By this we assume they mean the Order of the Commission issuing the License. This Order is a legislative act, issued by the Com-

mission as the designated and authorized agent of Congress. In the recent decision of the United States Supreme Court in *United States vs. Federal Power Commission,* Nos. 28 and 29 October Term 1952, decided March 16, 1953, the Court on page 14 of the decision refers to the "general grant of continuing authority to the Federal Power Commission to act as the responsible agent in exercising the licensing power of Congress" and, after citing *First Iowa* case with reference to the need for and breadth of power granted to the Commission, further says:

> "And so, in 1930, the Commission was reorganized as an expert body of five full-time commissioners. 46 Stat. 797, 16 USC Sec. 792. These enactments expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies. Cf. 41 Stat. 1065, as amended, 49 Stat. 839, 16 USC Sec. 797; 3 Rep. Pres. Water Resources Policy Comm'n 501 (1950)."

It was an order of the Commission and conflicting statutes of Iowa that were involved in the *First Iowa case* and in *Iowa vs. Federal Power Commission,* 178 F. (2d) 421. The latter also involved the adequacy of provisions concerning fish handling facilities.

Petitioners state (p. 40) that the City has no right as a person under the Federal Constitution, it being merely a creature of the state and dependent entirely upon the will of the legislature. The City claims no privileges and immunities or protection here as a person under the Fourteenth Amendment, but it does claim that the Federal Constitution and the law enacted pursuant thereto are the supreme law of the land, made so by both the Federal and State Constitutions, and binding upon the State as well as

their subordinate bodies and all others. Further, in dealing with subordinate bodies the legislature must do so by appropriate legislative act, and in accordance with the provisions of the State Constitution. We shall further discuss this matter under the subheadings of A 4 hereof.

Petitioners urge (pp. 41-48) that the passage of Chapter 9, Laws of 1949, was an exercise of the police power of the State, and cite *State vs. Towessnute,* 89 Wash. 479, 154 Pac. 805; *State ex rel Campbell vs. Case,* 182 Wash. 334, 47 P. (2d) 24, and other Washington cases, and *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298, and other federal cases to sustain their positions. There can be no doubt but that the State's authority to regulate and control its fish is an exercise of the police power. Its authority to do most things, as those relating to health, safety, morals, public convenience, general prosperity and welfare, is in the same category. *State vs. Pitney,* 79 Wash. 600, 611, 140 Pac. 918. It does not follow that a state law so passed takes precedence over the conflicting provisions of the Federal Power Act, or that it remains unaffected thereby. In the *Towessnute* case the Washington Court, referring to the police power to regulate fish, says:

> "It must be exerted, to be sure, in such manner as will not infringe other rights which the states, by the constitution, gave up to the central authority;"

Also in *McCready vs. Virginia,* 94 U.S. 291, 24 L. Ed. 298, the Court, referring to the State's ownership of fish, says:

> "The title thus held is subject to the paramount right of navigation, the regulation of which with respect to inter-state or foreign commerce, has been granted to the United States."

See also *Foster-Fountain Packing Co., vs. Haydel,* 278 U.S. 1, 73 L. Ed. 147.

In none of the State or Federal cases cited by Petitioners was there a conflict between State and Federal statutes, and in none did a Federal statute yield to a State one, police powers or no police powers.

Petitioners urge (pp. 44-45) that the power to regulate fisheries was not among those granted to the Federal Government, but was reserved exclusively for exercise by the states, and cite *McCready vs. Virginia*, 94 U.S. 291, 24 L. Ed. 298, and *Davis vs. Olson*, 128 Wash. 393, 222 Pac. 891, in support of their position.

Conceding that the power to regulate fisheries was not granted to the Federal government, and that an act of Congress having as its sole purpose such regulation would be invalid, it does not follow that Congress, in exercising its war or commerce or other granted powers, may not legislate in such manner as to affect fish, and to affect them seriously. To permit the exercise of the nation's legitimate powers to prevail over the exercise of the State's legitimate powers is the very purpose of the supremacy clauses of both the State and Federal Constitutions. *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L. Ed. 23.

In *Davis vs. Olson, supra,* the Washington Supreme Court expressly says that "the Federal government may prohibit or give its assent to the maintenance of fixed structures in navigable waters." Give its assent is what it has done here. The Court continues, "but it does not assume to give any right to take fish". It has not done so, nor purported to do so, here, in any ordinary sense or usage of the word "take".

Petitioners cite *Holyoke Water Power Co. vs. Lyman*, 82 U.S. 500, 21 L. Ed. 133, and other cases, as sustaining the proposition that one obstructing the waters of a stream is under obligation to provide fishways therefor. The City

does not deny this, and has continually expressed its willingness to provide such facilities. The question remains, what facilities, and finally approved by whom? It may well be in the present case that when the complete plans and specifications for fish facilities are finally worked out and installed, they will be those approved by both the U. S. Fish and Wildlife Service and the heads of the State Agencies. The point now involved is not so much final approval, as it is threatened outright denial. That Congress under the Federal Power Act intended the Commission to deal with and have final say over the kind and extent of fish facilities installed, along with the other features of the water power development, seems to us obvious. It had dealt with fish at dams in many projects over a long period of time, had made appropriations for their aid, and had its own fisheries and wildlife agency, and certainly knew that fish would be involved in water power development. The Wildlife Resources Act of March 10, 1934, (16 USCA 661 et seq.) shows its cognizance of the subject.

The suggestion that the State could by legislative act appropriate all the waters of a river system within its border to exclusive use for fisheries purposes, is simply another way of claiming that the Federal law is not supreme. If the State could do this, it could similarly appropriate such waters for any other purpose within its broad police powers, and development of our water resources, even by the Government itself, would be defeated.

Petitioners refer (p. 45) to Section 27 (the savings clause) of the Federal Power Act. We shall discuss this section under the next heading herein.

3. The State Statutes in Question are Superseded by the Federal Power Act, and do not Affect the Commission's Authority to Issue a License to the City.

What we have already said bears fully upon this question. We think Petitioner's position is completely answered by the decision of the United States Supreme Court in *First Iowa Hydro Electric Coop. vs. Federal Power Commission,* 328 U.S. 152, 90 L. Ed. 1143. We rely fully thereon and on the excellent reasoning therein contained.

Petitioners cite (pp. 48-51) several sections and parts of sections of the Federal Power Act as supporting their contention that the act expressly withholds authority from the Commission over the State's fisheries resources. Sections 9(b) and 27 of the Act are discussed at length in the *First Iowa* case and are covered herein. The other sections and provisions noted are not of particular importance here. Sections 201 and 202 are contained in Part II of the Act, and deal solely with the regulation of interstate transmission and sale of electric energy. They are intended to supplement intrastate regulation or rates and service by the State, and have no bearing whatever on the construction of water power projects.

Section 9 (16 USCA 802) specified the information which an applicant shall submit to the Commission. It contains three subdivisions. The opening clause and subdivision (b) reads:

> "Each applicant for a license under this chapter shall submit to the commission—
>
> * * *
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to

the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter."

The state laws mentioned are only those "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes" and to engage in the power business.

The evidence as to compliance with state laws is to be such as is "satisfactory" to the Commission. This it may be, either by a showing of actual compliance, or the supersedure and inapplicability of state laws ,or a showing that their applicable provisions will be met in due course. A case in point would be acquisition of property rights, which would necessarily largely follow the granting of the License. By Section 21 it is the "licensee" that is granted the right of eminent domain. In the *First Iowa* case, where statutes of Iowa somewhat similar to those in question here were involved, the Court, at page 1148, said that Section 9(b) *does not require a compliance with any state law.*

Section 27 (16 USCA 821) contains the "savings" clause of the Act. It evidences the recognition by Congress of the need for such a clause if the usual rules of supersedure are to be avoided. It also evidences the limits placed upon the state laws saved. The section reads:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, apropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The laws saved are those "relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein". The plan and provisions of the whole act demonstrate that by this are meant laws relating to property rights. The Supreme Court, commenting on the effect of the Act upon related State statutes, in the *First Iowa* case said at page 1153:

> "We find that when that Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation and a determination to avoid unconstitutional invasion of the jurisdiction of the states. *The solution reached is to apply the principle of the division of constitutional powers between the state and Federal Governments.* This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.
>
> "The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States. *These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States.*" (Italics ours).

There is thus to be no duality, and the emphasized sentences indicate the line of division between the subjects assigned to the states and those assigned to the nation. It is exactly along the line of division of constitutional powers, and as far as Congress can go in assertion of its authority, without infringing on that of the state, Congress has gone.

Representative Wm. L. LaFollette, a member of the Special Committee on Water Power, which reported the bill which became the Act, speaking of Section 9(b), said:

> "'*The property rights are within the State.* It can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks, if it desires to, and that has been done in some States. If we put in this language, which is practically taken from that Supreme Court decision *(United States v. Cress,* 243 U.S. 316, 61 L. Ed. 746, 37 S. Ct. 380), *as to the property rights of the States* as to the bed and the banks *and to the diversion of the water,* then it is sure that we have not infringed any of the rights of the States in that respect, *or any of their rules of property,* and *we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development.* We are earnestly trying not to infringe the rights of the States. If possible we want a bill that cannot be defeated in the Supreme Court because of omissions, because of the lack of some provision that we should have put in the bill to safeguard the States." (56 Cong Rec. 9810). (Italics ours).

The Supreme Court, commenting on Representative LaFollette's statement, said at page 1155:

> "As indicated by Representative LaFollette, Congress was concerned with overcoming the danger of divided authority so far as to bring about the needed development of water power and *also with the recognition of the constitutional rights of the states so as to sustain the validity of the Act.* The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states through the Act, without setting up a divided authority over any one subject.
>
> "Sections 27 and 9 are especially significant in this regard. Section 27 expressly 'saves' certain state laws

relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act." (Italics supplied)

The Supreme Court, speaking further as to the effect of Section 27, says at page 1156:

"The effect of Sec. 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights.* The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses'. Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." (Italics ours)

If Section 27 had any broader saving effect than indicated by the Supreme Court in the *First Iowa* case, the whole purpose and intent of Congress in passing the Federal Power Act would be defeated. It certainly was not the intent to save to the states their legislation on the very matters Congress was legislating about, and to permit the states, if they so chose, to pass legislation restricting the use of the very waters which were the subject matter of the Act. The granting to the Licensee of the right of eminent domain indicates that Congress intended that the licensee should be able to acquire all the property and other rights necessary for the project, including vested rights to appropriate, divert and use waters. It could not have been reasonably intended that the taking of water for use by a few persons for irrigation purposes, or by a small community for municipal purposes in the path of a huge project, should block such a project. It was merely meant that these vested property rights should be pro-

tected and proper compensation made therefor. Any other interpretation of the Act would render it unworkable and defeat its purpose.

Petitioners cite (pp. 53-56) the cases *Ford & Sons vs. Little Falls Fibre Co.,* 280 U.S. 369, 74 L. Ed. 489; *Grand River Dam Authority vs. Grand-Hydro,* 335 U.S. 359, 93 L. Ed. 64, and *United States vs. Gerlach Live Stock Co.,* 339 U.S. 725, 94 L. Ed. 1231. Each of these cases dealt with property rights, and the recovery of compensation therefor. The same is true of the cases of *United States vs. Cress,* 243 U.S. 316, 61 L. Ed. 746, and *Niagara-Mohawk Power Corp. vs. Federal Power Commission,* (CA DC No. 10862), decided December 31, 1952, cited respectively on pages 65 and 67 of Petitioners' brief. The first case is the one referred to by Representative LaFollette in the *First Iowa* case as relating to property rights. In the second case the Court specifically points out that Congress "was taking care not to impinge upon the rights of the states or upon their rules of property concerning diversion of water". A diversion of waters, as distinguished from the property rights therein, was involved in the *First Iowa* case.

The case of *State ex rel Washington Water Power Company vs. Superior Court,* 34 Wn. (2d) 196, 208 P. (2d) 849, cited on page 57, merely held that the Commission's outhority to regulate rates and charges of Licensees in accordance with the express terms of the Act extended only to licensees who were public service companies. It involved no question of conflict between state and federal laws, but only one of interpretation of the federal law itself.

Petitioners state (p. 58) that "the purpose and nature" of the state statutes involved here are "entirely different" from those involved in the *First Iowa* case. The Washington statutes, they say, "set forth a state policy in respect to

diversion of water and the protection of fishery resources". Examination of Sec. 7771, Chapter 363, Code of Iowa, 1939, involved in the *First Iowa* case, discloses that that section reads:

> "7771. When permit granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and *any water taken from the stream in connection with the project is returned thereto at the nearest practicable place* without being materially diminished in quantity *or polluted or rendered deleterious to fish life,* it shall grant the permit, upon such terms and conditions as it may prescribe." (Italics supplied).

We assume that Petitioners must have overlooked the wording of this statute. The Court in commenting on the provision against diversion, said at page 1150:

> "This strikes at the heart of the present project. The feature of the project which especially commended it to the Federal Power Commission was its diversion of substantially all of the waters of the Cedar River near Moscow, to the Mississippi River near Muscatine. Such a diversion long has been recognized as an engineering possibility and as constituting the largest power development foreseeable on either the Cedar or Iowa Rivers."

Since the state laws saved by Section 27 are those which have "primary, if not exclusive, reference to such proprietary rights," the principles of *ejusdem generis* discussed from pages 61 to 66 of Petitioners' brief are not particularly important here. As long as the saved laws are those relating to property rights, it does not much matter what kind of property. We very much doubt, however, that when Congress chose the words "irrigation" and "munici-

pal" to characterize the kind of uses of water it had in mind, it surmised that it might be later urged that the words "other uses", used in connection therewith, included the common and customary use of the water by the fish therein.

Petitioners carry the above phase of their argument to the extent that they arrive (p. 65) at the conclusion that since the use of water to develop power is a recognized municipal use, any state act relating to power is exempt from the provisions of the Federal Power Act. This is completely counter to the goal of Congress as so clearly stated in the *First Iowa* case.

In discussing the principals of *ejusdem generis,* Petitioners quote *Alabama Power Co. vs. Gulf Power Co.,* 203 Fed. 606, 619, as construing Sections 27 of the Act to include laws relating to the rights of riparian owners with respect to the formation of ice on streams, the construction of wharfs, piers and docks, and the right to shoot wild water fowl from boats. Surely it is only property rights in connection therewith that are saved.

Petitioners state (p. 66) that the "Respondent has not shown, nor could it show, that there are no other sources of power which would supply that expected to be produced by the Cowlitz dams". Such proof is not required by the Act on the part of any applicant. Applicant has shown that its proposed project is the "best adapted" use of the waters of the river, and that there is no other comparable site within its reasonable proximity. To require an applicant to do more would result in each application in turn being denied because there was another site, and the applicant perhaps finally being told that it should forget about water power and build a steam plant.

The Petitioners refer (pp. 66-67) to the Federal Power Commission and the City as *taking* the State's property. The

Commission's Order does not provide for the taking of any property, or even any fish, and the City is and will take none. The Order merely grants a license to the City to use the waters of the river in the future for power development. The State's "property right" in the fish while at large does not extend to or exclude this future use of waters for power purposes. As to this use or non-use the Federal government is answerable to no one. *United States vs. Appalachian Electric Power Co.,* 311 U.S. 377, 424, 85 L. Ed. 243, 261.

4. The City has claimed No Unauthorized Rights, has Proceeded in Accordance With Applicable Laws, and is a Proper Licensee Under the Federal Power Act.

a. *Chapter 9, Laws of 1949, is superseded and invalid in toto.*

Petitioners' argument under the corresponding subheading of their brief is to the effect that even if Chapter 9, Laws of 1949, is superseded and invalid as to private persons and corporations and cooperative associations and the government itself under the *First Iowa* case, it is still valid as to the City and other municipalities of the State.

In support of their position Petitioners, from pages 69 to 74, cite cases to the effect that municipal corporations are subordinate bodies or creatures of the state, that they derive their powers solely from th State Constitution and statutes, that powers once delegated to them may be taken away at will ,and that they have no privileges and immunities under the Federal Constitution.

We agree that the City is a subordinate body of the state, that along with towns, counties, school districts, port districts, public utilities districts and other bodies, it has been referred to as a creature of the state, that it derives its existence, powers and privileges from the state, and that

the legislature by appropriate act can take away its powers and privileges, and subject to certain limitations even snuff out its existence. *But just because the legislature has an undoubted right to legislate upon a particular matter or to do a particular thing, does not mean that it has done so or even attempted to do so, or that such act as it did pass was intended for that purpose or is a valid enactment.*

The question here is not one of the City's *right* or *privilege* to preceed in derogation of State laws, or to flaunt the authority of its sovereign, or to defy its creator; but rather, merely, what is the valid and applicable law? If Chapter 9, Laws of 1949, is superseded and unconstitutional upon any of the grounds urged, it is no law at all, and to contest its attempted enforcement by state officials under color of office constitutes no defiance. Neither is it a matter of ignoring state policy. The state can have no policy counter to the nation's in the field of Federal supremacy. Compare *Christy vs. Port of Olympia,* 27 Wn. (2d) 534, 550, 179 P. (2d) 274. An invalid law is no policy. It is the very essence of lawlessness.

The authorities cited by Petitioners, pages 72 to 74, to the effect that subordinate bodies of the State have no privilege and immunities and are entitled to no protection under the equal protection and due process and contract causes of the Federal Constitution, all concern and are limited to interpretation of the first section of the Fourteenth Amendment to the Federal Constitution, the provisions of which are designed to protect *citizens* against *State* action. Since municipalities are a part of the State, the State can have no inviolate contracts with them, and they are not "citizens" under the Fourteenth Amendment. This principle is expressed in *Paine vs. Port of Seattle,* 70 Wash. 294, 126 Pac. 628, where the Court said:

"The general rule is that municipal corporations—the 'taxing districts' here involved—are creatures of, and subject to the regulation of, the legislature, and it seems clear that the Fourteenth Amendment was not intended to affect that principle."

The fact that the Fourteenth Amendment does not apply as between the State and its subordinate bodies does not mean that the other provisions of the Federal Constitution do not govern and control them. The contrary is true. These other provisions of necessity are effective and supreme everywhere, and this supremacy is not a limited one. If the Federal Government is legislating within its granted powers, its acts do and must supersede and invalidate all contrary provisions of any state law. They are as much the law of the land as if enacted in each state separately. We may thus here assume that the Federal Power Act is in effect a state act, and the conflicting and superseded act a nullity.

See *In re Stixrud's Estate,* 58 Wash. 339, 342, 109 Pac. 343; *Federal Land Bank vs. Statelen,* 191 Wash. 155, 158, 70 P. (2d) 1053; *Sound View Pulp Co. vs. Taylor,* 21 Wn. (2d) 261, 274, 150 P. (2d) 839;*Gilvary vs. Cuyahoga Valley R. Co.,* 292 U.S. 57, 78 L. Ed. 1123, 1126.

In *Gibbons vs. Ogden,* 9 Wheat. 1, 6 L. Ed. 23, Justice Marshall said at page 209:

"The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance

of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Again in *United States vs. California,* 332 U.S. 19, 91 L. Ed. 1889, 1893, which involved offshore lands, the Court said:

> "We have said that the constitutional power of Congress in this respect is without limitation. United States v. San Francisco, 310 U.S. 16, 29, 30, 84 L. Ed. 1050, 1059, 1060, 60 S. Ct. 749. Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

The State above all others should comply with Federal law constitutionally enacted. Conversely stated, it cannot lawfully violate the same, either directly or indirectly, by itself or through direction to its subordinates. Municipal ordinances must conform to state laws, and state laws in turn must conform to federal law, which is expressly made binding on all state judges.

b. *Chaper 9, Laws of 1949, being invalid in part, is invalid in whole.*

As preliminary to this discussion we ask these questions; Assuming the provisions of Chapter 9, Laws of 1949, are invalid and inapplicable as to private persons and corporations and cooperative associations and the Federal government under the *First Iowa* case, can they be valid and applicable as to municipalities? Assuming that the legislature could, had it elected so to do, have passed an act confined to municipalities and expressly prohibiting them from constructing any dam or making any diversion, can the act *as actually written* be construed as if it was

so written? Can the invalid provisions and their application to the first group be separated constitutionally from the same provisions and their application to the second group, and the Act in its newly construed form still stand as an expression of legislative intention?

The answer to these questions lies in the principles of statutory construction relating to *separability*. For an excellently concise discussion thereof see *Sutherland Statutory Construction (3rd Ed.) Chapter 24*. There are a number of these principles that are of great aid in construction.

The general rule was well stated by the Washington Court in *Corwin Investment Co. vs. White,* 166 Wash. 195; 6 P. (2d) 607. The Court said at page 198:

> "The rule is that the entire act will fail where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning and purpose that it cannot be believed that the legislature would have passed the one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish any of the purposes of the legislature. *State v. Powles & Co.,* 90 Wash. 112, 155 Pac. 775; *Northern Cedar Co. v. French,* 131 Wash. 394, 230 Pac. 837.

In *Williams vs. Standard Oil Co.,* 298 U.S. 235, 73 L. Ed. 289, the Court at page 309 similarly states the general rules applicable to questions of separability:

> "But the general rule is that the unabjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail'. The question is one of interpretation and legislative intent, * * *

> " 'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.' " (Italics ours)

Certainly elimination of the invalid provisions here would not leave the features and purposes of the act "substantially unaffected" by the process. It is difficult to believe that the legislature would have created the sanctuary *applicable only to municipal projects.* It would then, in fact, have no longer created an effective sanctuary.

In *Northern Cedar Co. vs. French,* 313 Wash. 394, 230 Pac. 837, the act under inquiry was one regulating commission merchants. Section 8 authorized the Director of Licenses to forfeit a commission merchant's license, but made no provision for notice or hearing. The court held this section invalid, but sustained the remaining provisions because the act carried a separability clause. It said at page 415:

> "Ordinarily, we would be disposed to say that the legislature would not have passed this act without some provision for the cancellation of licenses. But the last section expresses the legislative intent when it says that if any section or part of a section of this act shall, for any cause, be held unconstitutional, such holding shall not affect the rest of this act or any section thereof'. By this provision the legislature has expressely overcome the presumption that we would ordinarily draw that the act would not have been passed but for some provision for the annulment of licenses."

Chapter 9, Laws of 1949, contains no separability clause, and its provisions seem hardly capable of division,

or divisible in application, if the objectives of the act are to be preserved.

Even presence of a separability clause will not save the remaining provisions of an act where elimination of an invalid provision will materially alter or change the tenor of the act, and make it operate or apply in a manner never contemplated. *State vs. Inland Empire Refineries,* 3 Wn. (2d) 651, 101 P. (2d) 975; *Jensen vs. Henneford,* 185 Wash. 209, 53 Pac. (2d) 607.

The legislature is not presumed to intend to pass a partially invalid act, nor an unreasonable one. The intent of the legislature is to be found in the act itself. It must appear therefrom that the legislature intended to deal with the saved portion of the original subject matter regardless of the validity of the remainder. *Sutherland Stat. Const. (3rd Ed.) Sec. 2403.*

With the foregoing general principles in mind let us examine the language of Chapter 9 to see what it indicates. This language is general and sweeping in phraseology. It creates a single sanctuary embracing an extensive portion of the State's largest river system. This sanctuary is "against undue industrial encroachment". It does not say "by municipalities". It does not mention municipalities or suggest that it is dealing therewith in any way differently than with anyone or anything else. The limitation is against construction of *any* dam over 25 feet in height. "Waters" are not to be diverted for *any* purpose other than fisheries. The right of eminent domain is granted to acquire *any* water right that may have become vested, and to abate *any* dam or other obstruction. These are words of all inclusive meaning. It is not to be presumed that the legislature would have passed the act with the word "some" substituted.

Another pertinent inquiry is whether the terms of the act are such as to warrant a belief that the legislature would have passed the act without the invalid parts, and with its limited application. It would in that case have only created a sanctuary against municipal power development, while leaving private and governmental power untouched. It would have permitted private dam construction and diversion of waters, but not public.

Another pertinent inquiry is the importance of the invalid features. Would their absence materially change or alter the act, or largely defeat the accomplishment of its purposes? Such a result, we submit, would inescapably follow here. Dams constructed and diversions made by private operators or cooperatives, or the Federal Government, would have exactly the same effect on fish as if constructed or made by a municipality. And since the number of possible dam sites in the area is limited, in the end the same total number of dams would be constructed and diversions made, and result in the same total number of industrial encroachments. The only difference would be that the dams would be differently owned and, incidentally, less subject to direct legislative control. Even in the case of a project such as the one at bar, the partially valid act would not succeed, except temporarily, in blocking the project. The City could presumably assign its license, or such rights as it has, to a private operator or cooperative association, and they could proceed, or a new license could be granted upon application by new qualified parties.

We have here a situation where the entire state act is invalid in the major part of its application, and where, in its altered form, it would operate differently than the legislature intendeded, and falter and fail wholly in its

purpose. Under the principles of statutory construction above stated it is clearly invalid and unconstitutional in its entirety. It thus makes no difference that a part of the provisions of the Act might be deemed valid and enforceable if separately enacted. Here the invalid provisions are so essentially a part of the whole act that without them it cannot stand.

All of the above does not mean that the State could not prohibit its municipalities from engaging in any phase of the power business if it saw fit so to do by proper act passed for that purpose. It could take the municipalities out of the power generating business entirely, or even out of the whole of the utility business. This, however, it has not done, nor purported to do, and is an entirely different subject and would, of course, call for a wholly different act and an entirely different determination of policy than that which was involved in the passage of Chapter 9, Laws of 1949.

We have undertaken to show the *inseparability* of the provisions and application of Chapter 9. The burden is really on the Petitioners to show the opposite—their *separability*. The rule in this respect is well stated in *Carter vs. Carter Coal Co.*, 298 U.S. 238, 80 L. Ed. 1160.

The City has a clear right to attack the constitutionality of the Act in question, even if the provisions of the act be assumed to be valid when applied directly to it. In *Rottschaefer on Constitutional Law, page 29*, it is said in this respect:

> "The general rule that denies a person the right to question the constitutionality of an act in respect of its enforcement against others is inapplicable in some situations. The unconstitutionality of a part of a statute sometimes renders the remainder thereof

> legally inoperative. The persons affected by the remainder are permitted to question the constitutionality of the invalid part even though it does not apply to them, since that is an essential element in establishing that the remainder is legally inoperative as to them."

The above quotation is set forth and adopted and applied in the recent Washington case of *In re Hendrickson*, 12 Wn. (2d) 600, 608, 123 P. (2d) 322. See also: *McFarland vs. City of Cheyenne,* 48 Wyo. 86, 42 Pac. (2d) 413; *Gretna vs. Bailey,* 141 La. 625, 75 So. 491; *United States vs. Reese,* 92 U.S. 214, 23 L. Ed. 563.

The right of a subordinate body to contest with the State is neither new nor infrequently exercised. There is no other way for them to assert their constitutional and statutory rights when state officials interfere or adversely interpret.

The municipalities and other subordinate bodies of the State can and frequently do engage in litigation with the State and also with officers thereof who may, as here, be merely acting under color of office under an unconstitutional act. In such cases the action is not really one between the State and its subordinate bodies, but between the subordinate bodies and such state officials acting in their individual capacity.

In *State ex rel Robinson vs. Superior Court,* 182 Wash. 277, 46 Pac. (2d) 1046, the Court said in this respect at page 280:

> "It is now settled beyond question that a suit against State officers in which an attack is made against the constitutionality of a State statute is not a suit against the State."

To the same effect are: *State ex rel Shoemaker vs. Superior Court,* 193 Wash. 465, 76 Pac. (2d) 306; *Wiegardt vs. Brennan,* 192 Wash. 529, 73 Pac. (2d) 1330; *State ex rel. Fleming vs. Cohn,* 12 Wn. (2d) 415, 121 Pac. (2d) 954; *Ex parte Young,* 209 U.S. 123, 52 L. Ed. 714.

If Chapter 9, Laws of 1949, is superseded and unconstitutional, then the State Directors are here under color of office and merely as individuals. The City's right to challenge the act in the end depends on the effectiveness of the act itself. If it is invalid, the City has a right to so assent.

c. *The Subject of Chapter 9, Laws of 1949, is not Expressed in the Title, and the Act Embraces More Than One Subject, and is Unconstitutional on This Ground.*

The title to the act is "An Act relating to the *protection of anadromous fish life* in the rivers and streams tributary to the lower Columbia River and declaring an emergency" (Emphasis supplied).

The latter portion of the title merely indicates the location where the act is intended to apply. It adds nothing to the sufficiency of the title. The *subject* of the act is confined to, and must be found solely in, the clause "protection of anadromous fish life". The challenge to the title is as to its *narrowness.*

It is our position that the foregoing title fails to meet the requirements of Article II, Section 19, of the State Constitution, which reads:

> "No bill shall embrace more than one subject, and that shall be expressed in the title."

It is submitted that the pharse "protection of anadromous fish life" is not sufficiently broad to indicate that what is to be found in the body of the act is provisions setting up

as a sanctuary the vast river system mentioned, and prohibiting hydro-electric power and industrial development thereon. There is neither hint nor suggestion in the title that any such sanctuary is to be created, or that hydro-electric dams or industries are to be limited or prohibited, or that if any exist, they are to be acquired and destroyed. No mention whatever is made in the title of reserves, or sanctuaries, or dams, or industries, or existing structures, or water rights, or of their acquisition and abatement, or purchase or condemnation.

The body of the act legislates far beyond the scope of the title. The Petitioners have even sought to construe the act as one limiting or withdrawing the powers of municipalities. Yet there is no reference in either the title or the body of the act to municipalities or their powers, and clearly the act, if applicable *at* all, was intended to be applicable *to* all, private individuals and companies and cooperative associations and municipalities alike.

The title of the act represents that the act relates to the "protection of anadromous fish life". Not all fish life, but "anadromous" fish life only. Further, the key word is "protection". What would one, seeing it used in connection with anadromous fish life, think? Would there come to his mind the possible barring of badly needed major hydro-electric power projects on the whole river system, and the prohibition of possible future hugh industrial developments requiring the use of higher than 25-foot dams? Would there arise in his mind the thought of the State's acquiring for the purpose of destruction existing water rights, or of its abating or condemning and destroying existing structures? Would he understand the title as heading an act which if passed would in effect limit or prohibit public power developments while leaving private

undertakings untouched? Would he see the pending bill, in effect but without saying so, as one limiting or withdrawing powers previously granted to cities, towns and public utility districts? We think that the obvious answer to each of these questions is that the title of the act gives no such warning, and clearly demonstrates the insufficiency thereof. It is distinctly not a vehicle of notice. *Shea vs. Olson,* 185 Wash. 143, 152; 53 Pac. (2d) 615.

The word "protect" as defined, and as ordinarily used and understood, means to cover, to defend, to guard, to shelter, to shield, to keep free from danger. "Protection" is the noun of the term. (See 34 Words & Phrases 642). It hardly connotes steps as drastic and far reaching and costly as those attempted to be authorized and permitted here. When such steps are intended, better words of warning of the contents of the act should be used.

Broad titles, embracing many related matters, are sustained. *Marston vs. Humes,* 3 Wash. 267, 28 Pac. 520. But the fact that a title broad enough to bundle the contents of an act under one subject *could have been written,* does not correct the situation, such as that here, *where it was not.* Cases sustaining broad titles are largely not in point here.

We shall confine ourselves to citing Washington cases.

In *Anderson vs. Whatcom County,* 15 Wash. 47, 45 Pac. 665, the title to the act challenged was "An Act to provide for the economical management of county affairs". Under this title the act provided that salaries and expenses of certain county officers should not exceed the fees collected on account of their offices. The Court held that the title did not give "a legal notice of the reduction or change of salaries".

We submit that the clause "economical management of county affairs" comes considerably nearer embracing reduction of county officials' salaries than does "protection of anadromous fish life" to embracing limitation or prohibition of hydro-electric power and other industrial development.

In *State ex rel Nettleton vs. Case,* 39 Wash. 177, 184, 81 Pac. 544, the title to the act was "An act in relation to the fees of State and County officers, witnesses and jurors". Under this title the act set up various fees to be charged by the County Clerk ,including a sliding scale of fees in probate proceedings based upon the valuation of the estate. The Court held that such charges were in the nature of a property tax and not a fee. The Court said:

> "By no reasonable exercise of the imagination can it be inferred from the above title that the act treats of the subject of exacting an ad valorem charge or tax from the property of estates. It therefore violates Sec. 19 of art. 2 of our state constitution, which requires that, 'No bill shall embrace more than one subject, and that shall be expressed in the title'."

The Court construed what the above act called a "fee" to be a "property tax", and then held the title insufficient because it did not mention this latter subject. In the case at bar Petitioners seek to construe the act as one limiting or withdrawing powers previously granted to municipalities. But that is not what the legislature in the title of the act said it was going to do. It made no mention at all of municipalities or their powers. It merely said it was going to protect anadromous fish life. If the act is to be so construed, the title does not indicate that it was intended to so legislate, and is therefore invalid.

In *Cawsey vs. Brickey,* 82 Wash. 653, 144 Pac. 938, involving a game law, one of the many words used in the

title was "protection", The Court, in upholding the title, said that its general scope *indicated a bill constituting a complete game code* and that it was sufficient to cover provisions authorizing the creation of game preserves. It seems obvious from reading the case that had the title been one merely relating to the "protection of game birds", etc., it would not have been upheld. Yet in the case at bar a river-system wide sanctuary is created, and in addition dams and industrial construction drastically limited or prohibited therein, under the simple title "protection of anadromous fish life."

In *State ex rel Toll Bridge Authority vs. Yelle,* 32 Wn. (2d) 13, 19, 27; 200 Pac. (2d) 467, the title to the act authorized the purchase and operation of toll bridges, highway and ferry connections and approaches thereto. One section of the act authorized the acquisition of "bridges or ferries which connect with or may be connected with the public highways of the state."

The Court held that the reference to purchase of "ferry connections" in the title was not sufficient to cover the acquisition of "ferries" as provided in the body of the act, and that the act included more than one subject.

A recent pertinent case is *Bellingham vs. Hite,* 37 Wn. (2d) 652, 225 Pac. (2d) 895. In that case the title was:

> "An act relating to police judges in cities of the first class; providing for appeals from judgments in criminal proceedings before such judges and amending title 60 chapter 7, R.R.S., * * *."

It was contended that there was nothing in the title to indicate that the act involved procedure in the superior court. In finding that there was no violation of the Constitution, the Court said:

> "The act itself has reference to superior court procedure only in connection with such appeals. An act dealing with appeals from police courts could scarcely avoid concerning itself with superior court procedure to this extent, and few would be surprised to discover that it did so."

Certainly an act dealing with protection of anadromous fish life could avoid concerning itself with and prohibiting hydro-electric power and industrial development, and most anyone would be surprised that it did so.

d. *Chapter 9, Laws of 1949, Contains an Unlawful Delegation of Legislative Authority, and is Unconstitutional on this Ground.*

Section 1 of the above act prohibits the construction of any dam over 25 feet in height on the river system mentioned "within the migratory range of any anadromous fish *as jointly determined by the Director of Fisheries and the Director of Game*" (Emphasis supplied). Likewise in the same section diversion of the waters of such river system is prohibited "for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow", with the proviso that when the flow is below the annual average "water may be diverted for use, subject to legal appropriation, *upon the concurrent order of the Director of Fisheries and the Director of Game*". (Emphasis supplied).

It is our position that both of these provisions contain an unwarranted and uncontrolled delegation of legislative authority to the two directors, in violation of Article II, Section 1, of the State Constitution, which vests legislative power in the Senate and House of Representatives.

Referring first to the provision for the determination by the two directors of "the migratory range of any anadro-

mous fish". There is no standard or guide in the act by which the two directors are to determine what is or is not within such range. Would it be determined by the movement of a single, or a few, or many fish? It hardly seems that the legislature intended to bar power and industrial development to clear a passage for a single fish. But, for how many? Where is the standard or yardstick by which the Directors are to be controlled and guided? Measured in terms of value, would it be $5.00 of $50,000, or what? Is the range subject to change by stream improvements or other artificial means? Or even from time to time by change of mind or change in the office of directors? We cannot find the answer to these questions in the act. The determination seems to lie in the sole and uncontrolled discretion of the two directors.

Referring next to the proviso permitting diversion of water for use "upon the concurrent order of the Director of Fisheries and the Director of Game". When and under what circumstances would such an order be given? How can anyone tell? It seems to lie wholly within the field of whim and caprice and personal prejudice. It could be granted one person and denied another entirely upon the directors' likes. It could in fact be denied a person on a single director's dislike or prejudice, since the granting of such an order must be concurrent.

The principles involved in this challenge to the constitutionality of the act have been stated by the courts on many occasions. They were last reviewed by the Washington court in the recent case of *State vs. Gilroy,* (1950) 37 Wn. (2d) 1, 221 Pac. (2d) 530. In that case the provisions of Chapter 172, Laws of 1933, were under inquiry. Section 5 of the act provided that any person carrying on the work of caring for children should obtain a certificate of appro-

val for the state director of business control. This certificate was to be issued by the director upon reasonable and satisfactory assurance of

> "(a) The good character and intentions of the applicant;
>
> "(b) The present and prospective need of the service intended by the proposed organization, with no unnecessary duplication of approved existing service;
>
> "(c) Provision for employment of capable, trained or experienced workers;
>
> "(d) Sufficient financial backing to insure effective work;
>
> "(e) The probability of permanence in the proposed organization or institution;
>
> "(f) That the methods used and the disposition made of the children will be in their best interests and that of society;
>
> "(g) Articles of incorporation and related by-laws;
>
> "(h) That in the judgment of the director the establishment of such an organization is necessary and desirable for the public welfare."

The Court first noted Article II, Section 1, of the State Constitution, and then cited the leading cases of *Panama Refining Co. vs. Ryan,* 293 U.S. 388, 421; 79 L. Ed. 446, and *Schechter Poultry Corp. vs. United States,* 295 U.S. 495. 79 L .Ed. 1570, in which are found a detailed discussion and an explanation of the distinction between valid and invalid regulatory legislation. Referring to the two cases, the Court said at page 45:

> "The principle is therein laid down that a law is invalid when the authority delegated leaves the regulatory agency with unguided and unrestricted discretion in the assigned field. Stated affirmatively,

> the method of regulation by delegation of authority is subject to the limitation that the law providing for the delegation must also prescribe an accompanying rule of action or lay down a guide or standard whereby the exercise of discretion may be measured. *State ex rel Washington Toll Bridge Authority vs. Yelle,* 195 Wash. 636, 643, 82 P. (2d) 120; *Ferretti vs. Jackson,* 88 N. H. 296, 188 Atl. 474, 478."

The Court pointed out that under (a) the director must be satisfied of the "intentions" of the applicant, under (b) with the "provisions for employment of capable, trained or experienced workers", and under (d) that the applicant has "sufficient financial backing to insure effective work". The court said that the act contained no criteria as to what the legislature regarded as satisfactory "intentions", or "capable, trained or experienced workers", or "effective work". The whole matter was left to the director as the sole judge. The act was stricken down. When its provisions, supposedly intended as a legislative standard or guide, are compared to the entire lack of any such provisions in the case at bar, it appears that that case is clearly controlling of this.

The act here challenged does contain some detail provisions, such as the 25-foot limit on dams and the definition of "annual average low flow", but these furnish no aid in determining "the migratory range of anadromous fish", nor when to issue a concurrent order.

There just is no standard or guide by which such "migratory range" is to be determined, or any such concurrent order issued. Both determinations lie even more in the sole fiat of the two directors, than did the deterination of good intentions and capable employees and effective work in the *Gilroy* case.

The following additional cases support and fully sustain our position: *State ex rel Markis vs. Superior Court,* 113 Wash. 296, 193 Pac. 845; *State ex rel Washington Toll Bridge Authority vs. Yelle,* 195 Wash. 636, 643; 82 P. (2d) 120.

B.

The Findings and Conclusions of the Commission are Supported by Substantial Evidence.

Section 313 (b) of the Federal Power Act expressly provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

This is appropriate, since the Commission is granted "broad administrative and investigative power", and is the "permanent disinterested expert agency of Congress", and the "executant of Congressional policy". *United States vs. Federal Power Commission,* Nos. 28 and 29, USSC October 1952 Term, Decided March 16, 1953.

We have outlined in our statement of the case the abundant evidence that overwhelmingly supports the findings of the Commission. Additional substantiating facts, which space will not permit mentioning, can be found throughout the lengthy record and the many exhibits.

What petitioners have done, in their brief and consistently throughout the proceedings, is to assume without proof and in spite of the proof, that fish values transcend all other values, that some possible fish losses outweigh the great power, navigation, flood control, recreational and other benefits of the project, and that the project should not go forward unless it conclusively appears that it would not result in any "deleterious effect" or other than

"relatively minor" effect, on the fish resources of the river. (R. 70, 106, 163).

In their reference to the evidence Petitioners largely confine themselves to directing attention to statements and other controversial items deemed favorable to themselves, and ignore all contrary evidence. Exhibit 25, and the results of the hatchery program predicted therein by the State Directors is an example.

Most of the findings to which Petitioners except are merely incidental to the principal finding (No. 59) that the project is "best adapted for improving or developing the waterway", which is the only finding required by Section 10 (a) of the Act. Even were these subsidiary findings omitted, the result would remain unchanged. Examples are: that the project is necessary for National Defense; and various items relating to fishery facilities.

The Court should not be called upon to perform the functions of the Commission, or to substitute its judgment for that of the Commission. *National Labor Relations Board vs. Link-Belt Co.,* 311 U.S. 584, 597, 85 L. Ed. 368, 378.

1. The Commission has Acted within its Powers and has Fulfilled its Obligation under Section 10 (a) of the Act.

In their corresponding subheading the Petitioners assert that the Commission has exceeded its powers. They do not point out in what respect.

The Assignments of Error (Nos. 6 to 8) discussed under this subheading go to the Commission's basic finding (No. 59) that the project is "best adapted" for the improvement and development of the river for the purposes specified in Section 10 (a) of the Act. This calls for

a weighing of the values of the different beneficial uses to which the waters of the river may be put. Yet Petitioners make no such comparison. They ignore the values entirely of the power, navigation, flood control and other benefits from the project. They also ignore fish savings.

The Commission's Finding No. 59 is not dependent for its validity upon the classification which the Army Engineers made in the 1948 Review Report of the Cowlitz River for development. The Army Engineers present attitude is expressed in their Section 4 (e) report (Ex. 5) to the Commission in this proceeding, wherein they state that they made no recommendation for federal development in the Review Report "because of the interest of local agencies in undertaking such development and because of the need for correlation of such development by local interests with the need for preservation of fisheries resources". This is neither an expression for or against, but simply a bowing to the Commission as the proper authority for decision.

Petitioners speak repeatedly of the 1948 Review Report as the "Comprehensive Plan", and seem to assume that this is what is meant by the same words found in Section 10 (a) of the Act, when applied to the Cowlitz River. Both the Army Chief of Engineers and the Commission (R. 249) have referred to the 1948 Review Report as a "basic framework" for basin development. It is not intended to be anything more, and Congress has not as yet adopted or approved it even as that. Petitioners say at page 79 that this was "because of pending S. 1645, a bill to establish a Columbia Valley Authority", but this is an unwarranted surmise on their part.

Even if the 1948 Review Report had been adopted and approved by Congress, it would not have restricted the broad and comprehensive authority of the Commission as

the chosen expert Agency of Congress to deal with the Cowlitz River within the basic framework.

The "waterway or waterways" referred to in Section 10 (a) of the Act, are expressed in the singular or plural, and the *one* with which the Commission is dealing here is the Cowlitz River. The Commission found that the proposed project is "best adapted" to a "comprehensive plan" for *its* development, and this was after giving consideration to the "basic framework" contained in the 1948 Review Report. The City as a condition to its application was not required to submit a comprehensive plan of development for the whole Columbia River basin, and neither was the Commission Staff.

On page 78 Petitioners state that "the necessity of preservation of the Cowlitz for fish runs will constantly be increased many times as the Columbia above Bonneville" is further utilized for power purposes. This is wholly unwarranted and misleading. The Cowlitz has no such potential. The Petitioners' fishery witnesses testified that the spawning areas were now saturated and being utilized to the full potential. See admission, page 103 Petitioners' brief.

The contract dated June 23, 1948, between the states of Washington, Oregon and Idaho, and the U.S. Fish and Wildlife Service (Ex. 33) referred to on page 79, makes no mention of the Lower Columbia River Fisheries Plan, and is in no way dependent thereon, and no expenditure planned thereby would be less useful or have to be abandoned because of the development of the Cowlitz River (Ex. 31).

2. There is Substantial Evidence to Support the Commission's Finding that:

a. *There is and will be a severe power shortage in the Pacific Northwest for several years.*

(Specifications of Error 9, Findings 17, 20, 21)

b. *The Federal Construction Program will not meet power demands.*

(Specifications of Error 9, Finding 16)

c. *The Proposed Project will help greatly to alleviate the power shortage.*

(Specifications of Error 10, Findings 22, 23)

d. *There are no comparable alternate sources of power available to the City.*

Specifications of Error 11, Findings 26, 28)

e. *The Proposed Project will assist in and is needed for the Defense Program.*

(Specifications of Error 12, Findings 13, 18, 20)

f. *The Benefits to be Derived from the Project outweigh Fish Values.*

(Specifications of Error 13, Findings 8, 25, 32)

These are all subsidiary or supporting findings. Perhaps the only one essential to the ultimate determination of the "best adapted" use of the waters of the river is the last one, but examination of Specifications of Error 13, and of Findings 8, 25 and 32 therein challenged, shows that they relate merely to recreational opportunities, power assistance to the Portland area during flood periods, and navigation benefits to which no monetary value is assigned. There is no comparison made of these with fish or other values.

In our Statement of the Case, consistent with the demands for brevity, we have set forth at some length the evidence herein. This evidence overwhelmingly supports the Commission's Findings. The Commission could not properly have found otherwise than it did.

First, as to the power shortage in the Pacific Northwest. The Bulletins and Reports of the Commission show this shortage to be the most critical in the nation. The action of the Washington Public Service Commission in restricting the taking on of new power loads (Ex. 60), the voluntary action of public agencies to the same end (R. 1266), the repeated urgent demands for power expansion by both the private and public power members of the Pacific Northwest Utilities Conference Committee (Ex. 21, sub. ex. 3, 4, 5), the studies and conservative forecasts (without allowance for new defense and aluminum loads) in the Bonneville Power Administration's 1950 Advance Program (Ex. 23), the Section 4 (c) statement of the Secretary of the Interior (Ex. 6), the letter of the Chairman of the National Defense Resources Board (Ex. 64B), the studies of Mr. Ward, City Engineer (Ex. 21), the testimony of public and private utilities executives (R. 913, 1059, 1158, 1365), and of the labor, veterans, business, professional, commercial, industrial, agricultural and other witnesses at the public hearing, and the studies of the Commission Staff (Ex. 52 to 56A, inc.), all demonstrate and attest this power shortage and its acuteness. There is in fact no substantial counter evidence.

Petitioners assert (p. 81) that the Commission's Findings place unwarranted emphasis on "critical water year". The Pacific Northwest has for the past several years been operating to the hilt on *above average rainfall*. The Department of the Interior letter (Ex. 6) points out that

only under such conditions will it be able to meet most of its needs for the next several years. This does not include new defense or aluminum demands (Ex. 23). The Bonneville Power Administration has for years been selling power on an interruptable basis (Ex. 23). Sound operation should meet demands and still allow a margin of safety. There must be some provision for failures and breakdown.

Finding 16 merely states that "the various Federal schedules known as "Advance Programs" show that the estimated time when new generating units would be placed in operation in the Columbia River Basin have not been met". They do so show. That the federal program alone will not meet potential demands is the concensus of opinion of all the foregoing (Ex. 21, p. 34). It has never been contemplated, at least by Congress, that the federal government should become the sole supplier of electricity in the Pacific Northwest.

Findings 22 and 23 state the need for and exceptionally valuable features of the proposed project, and add that "if made within three years", it would "assist greatly" in alleviating the power shortage. This is a correct comment, and but for the Petitioners' action it might have been substantially realized. It does not follow that because delay has been encountered the project loses its value. Such value may be even increased. Other projects, including the government's own, have suffered delay. The two years allowed in the License for commencing construction is a standard provision. It does not mean the Licensee will wait that long after litigation is cleared before commencing construction. That the proposed project will assist greatly to alleviate the power shortage seems obvious from the fact that it will add 10% to the present total plant capacity of the entire Pacific Northwest power pool.

Finding 26 is that "none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically", and Finding No. 28 that "the only new sources of power supply in substantial quantities that could be constructed by the Applicant and placed on the line in 1954 consist of the proposed Cowlitz Project and new steam electric plant". The testimony and studies of Mr. Ward discuss fully alternate sites (Ex. 21, pp. 42-53), and steam plants (Ex. 21, pp. 20-31). These alternate sites are neither comparable nor available. The Commission Staff's studies (Ex. 48, 49, 52) also cover comparative steam plant costs. They exceed those of the proposed project by $1,700,000 annually. See Finding 31.

Petitioners refer (p. 84) to the additional power that will be made available by the Yale and Rock Island projects. The power from these projects is included in present forecasts (Ex. 23, 26).

Petitioners refer (pp. 84-85) to House Resolution 4963 pending before Congress and proposing government construction in the Pacific Northwest of 400,000 K.W. capacity steam plants as a possible additional source of power. This resolution calls for a broad determination of whether the Federal government desires to enter into steam as well as hydroelectric generation. The present project should not be rejected on the assumption that Congress will adopt the new policy.

The statements contained in Findings 13, 18 and 20 are fully sustained by the record (Ex. 60, 23, 26). That the proposed project will aid in furnishing badly needed power for defense purposes seems obvious. The defense program is an overall longtime buildup effort and contemplates great increases in the nation's power resources. The chairman

of the National Defense Resources Board specifically endorsed the project(Ex. 64B).

The comparative values between power, navigation, flood control and incidental recreational benefits, and fish losses are discussed in our statement of the case under subheadings "The Proposed Project—Its Scope and Importance" and "The Cowlitz River and its Fisheries". They are further discussed under subheading B 1 above. These comparisons show that power and related values far exceed fisheries losses, even assuming all fish were lost. The Examiner says as much as "seven or eight to one", using a monetary yardstick (R. 143). We think the record shows it is even more.

3. There is Substantial evidence to support the Commission's Findings that:

a. *the Fish Runs in the Cowlitz will not be substantially destroyed*

(Specification of Error 14. Finding 41)

b. *a substantial portion thereof will be saved*

(Specification of Error 15, Finding 48)

c. *the City's proposed conservation practices, facilities and improvements should be carried out*

(Specification of Error 16, Finding 42)

d. *the hatcheries proposed by the City can be constructed ,operated and maintained at the cost estimated*

(Specifiication of Error 17, Findings 47, 49, 50, 51).

These are all subsidiary findings, and all relate to the fish facilities. They might all have been omitted without affecting the validity of the Order. The items designated c and d are particularly insignificant.

The City in Exhibit 14, prepared by Drs. Strunk and Hubbs, proposed certain practices, facilities and improvements for conservation of the fishery resources in the Cowlitz River watershed in addition to the facilities proposed for installation at the dams. These consisted of such things as biological studies, research, surveys of spawning areas, removal of stream blocks and debris, laddering of falls, abatement of polution, location of hatcheries sites, etc. This proposal was in general terms with detail left to be developed if the license was issued. It is this proposal which the Commission in Finding 42 says is not sufficiently detailed "to permit an adequate appraisal" of its effectiveness, but that it shows "enough promise to justify the carrying through of more detailed studies and plans". It is hard to see how this mild finding could have affected the Commission's decision, or how petitioners could be in any way prejudiced thereby. The Commission apparently attached no particular weight thereto.

By Finding 47 the Commission estimated the annual cost of operating and maintaining the fish facilities plus the fixed charges on the investment therein at $610,000. It then used this estimate in Findings 49, 50 and 51 in comparing its estimated power value ($1,700,000 annually) with its estimated fish losses based on three different assumptions, including one with no saving of fish at all. In each instance the balance clearly favored power values. Petitioners challenge the $610,000 estimate. It was derived by the Commission Staff from the estimated cost of constructing and operating the fish facilities and hatcheries as contained in Exhibits 10 (City Consulting Engineer's) and 25 (State Departments). The estimated cost, however, is one which the City is required by Article 31 of the License to assume and pay, whatever it may be, and Petitioners are and were in no way prejudiced thereby, even

if it is uncertain. It seems ample, however, and exceeds the entire annual net dollar value ($600,000) of the fish above Mayfield dam (see Finding 44).

Some of Petitioners' Specifications of Error are taken to language in the Commission's Opinion, as distinguished from its Findings. This seems inappropriate. Findings 41 and 48, included in Specifications of Error 14 and 15, refer only to downstream migration facilities and to the fishery resources below Mayfield dam, so that the claim of error is properly restricted thereto. However, taking the assertions contained in Petitioners' subheadings (p. 90) at their full meaning as they appear, they still are not well taken. They wholly ignore the State Directors' statements in Exhibit 25 as to the saving of fish. That Exhibit clearly shows that through a hatchery program not less than three-fifths of the fish values can be saved, and with intensive propogation possibly all. And if the City's proposed downstream fish handling facilities work (the U. S. Fish and Wildlife Service cannot say that they won't), an increase in fish production may well result, and the problem of fish and power, not only on the Cowlitz River but elsewhere, will be solved (Ex. 8). This should be worth while experimentally.

Loss of spawning area will be largely, if not entirely, replaced through the hatchery program (Ex. 25, 28), and the regulated and increased minimum flow of the river below Mayfield dam (Ex. 5, 14, p. 79), and the increased spawning area made available there (Ex. 28, p. 16) should improve the fishery potential in that area as found by the Commission.

Petitioners in this portion (pp. 91-105) of their brief discuss a great deal of the detail of the proposed fish handling facilities ,and renew the contentions which they made before the Commission in connection therewith. No good

purpose would be served by our replying thereto in detail here. Rather we respectfully refer the Court, if desired, to the material set forth in the Supplement to our Exceptions to the Examiner's Recommended Decision appearing in the Record as follows:

Issues to be Resolved (R 340)

Upstream Migration—Trapping and Hauling (R 341)

Downstream Migration Facilities (R 343)

Description of Downstream Migration Facilities (R 345)

Entrance Ports to Fingerling System (R 347)

Risers of Fingerling System (R 349)

Matters of Hydraulic Resign (R 350)

Fingerling System Operating Cycle (R 350)

Screening Fingerlings (R 351)

Keeping Screens Clean (R 354)

According to Plan (R 356)

Period for Further Research (R 357)

Construction Period Affords Time for Model Tests and Further Experimental Work (R 359)

Problems Stated in State Departments' Report and Solutions Suggested (R 362)

City's Proposed Fish Migration Facilities Developed Following State Departments' Report (R 364)

State Departments' Report Suggests Trapping and Hauling Upstream Migrants. City Would Add Ladders. (R 365)

State Departments' Report Suggests Artificial Propagation Because of No Known Adequate Downstream Migration Facilities (R 366)

Lower Columbia River Fisheries Plan (R 367)

Observations of the Laythe Report—Exhibit 32 (R 371).

C.

The Order Properly Provides for Further Studies and Tests of Fish Facilities in Cooperation with the Federal and State Agencies. It does not provide for Management of the Fishery Resource by the City

Assignments of Error 18 through 20 are discussed hereunder.

The Commission in issuing the license was executing the powers entrusted to it by Congress. It did not proceed arbitrarily or capriciously or in abuse of discretion as charged by Petitioners. It rather engaged in a long and expensive hearing given over largely to receiving evidence about the fishery resources of the river and their protection. The Order as finally issued makes provision for extensive fish facilities to be worked out by the City in cooperation with the U. S. Fish and Wildlife Service and the State agencies of Fisheries and Game. There is no reason to believe that these facilities will be anything less than the most modern, scientifically and efficiently, that these officials can recommend. It is not to be assumed that the Commission, in dealing with these resources of the State, will act harshly or unjustly in connection therewith. The Court in *United States vs. California,* 332 U.S. 18, 41, 91 L. Ed. 1889, 1900, an off-shore oil case, said in this respect:

> "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustice to states, their subdivisions, or persons acting pursuant to their permission."

The only thing is that, in view of the relative values found, the State agencies cannot themselves arbitrarily and capriciously refuse to recommend or approve any facilities.

The provisions for testing are consistent with the comparative values involved. Since the power and other benfits far exceed the entire fish values, it is not essential that all fish, or even any more than now seem likely, be saved in order to meet the criteria of Section 10 (a). To require testing over a double life cycle of the several runs of fish, as Petitioners suggest, would result in the loss during the period of testing of far more power values than would be gained in fish saved. The amount which the City is called upon to spend annually for fish facilities will exceed the entire annual value of the fish runs (Findings 44, 47).

The Petitioners seem to proceed throughout their brief on the assumption that the loss of any fish should bar the construction of any dam. They say (p 107) with reference to protective devices "it is not sufficient that it be capable of passing a portion of a run". Why not? Some saving should be better than none. Are hatcheries to be abandoned because they might only maintain the Fall Chinook and Silver runs (three-fifths of the whole), and a portion of the others?

Petitioners repeatedly speak of protecting "the fisheries resources", or of losing runs, or of "a valuable state resource" being jeopardized or placed at the mercy of the proposed devices, as if the entire fishery resources of all the streams and waters of the State and the Pacific Northwest hinged upon each feature of every device of the proposed facilities. This just is not so, and the Commission has correctly analyzed and so found.

Petitioners protest that provision should be made for withdrawal of the License if tests do not develop facilities capable of saving all of the fish. In view of the Commission's determination of relative values, no such thing is or was intended. It is only required that the best known or hereafter developed facilities be installed. On the basis of present knowledge this should have substantial success. Any such provision for withdrawal would destroy the effectiveness of the license and render financing impossible.

Insofar as they are entitled to it, Petitioners have had their opportunity for hearing, and will continue to have it hereafter. Article 30 of the License provides that the City shall conduct its studies and tests and work out the final design plans in cooperation with the U. S. Fish and Wildlife Service and the State Agencies, and it is not to be presumed that the Commission would refuse to heed good suggestions or hear any complaint about non-cooperation.

The Order does not place the management of the fisheries in the City. The City is given no right to control or regulate the taking of fish or otherwise to legislate concerning the same. It is merely required, consistent with the Federal Power Act, to construct the fish facilities and to pay the cost thereof and of operating and maintaining the same. The fact that the Commission has final say on these facilities is an exercise of commerce power, and not of any power to regulate or manage fisheries.

CONCLUSION

We respectfully submit:

That the Commission had full jurisdiction and authority to enter its order issuing the License to the City;

That the City is not required to comply with those State laws which have been superseded by the Federal Power Act, or are invalid;

That the Findings of the Commission are supported by substantial evidence and its conclusions are correct;

That the Order of the Commission should be affirmed.

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APPENDIX

CHAPTER 9, LAWS OF 1949, WASHINGTON
R.C.W. 75.20.010 - 75.20.030

AN ACT relating to the protection of anadromous fish life in the rivers and streams tributary to the lower Columbia River and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located with in the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports: Provided, That when the flow of any of the streams referred to in this section is below the annual average, as delineated in existing or future United States Geological Survey reports, water may be diverted for use, subject to legal appropriation, upon the concurrent order of the Director of Fisheries and Director of Game.

SEC. 2. It shall be the duty of the Director of Fisheries and the Director of Game, to acquire and abate any dam or other obstruction, or to acquire any water-right which may have become vested on any stream or rivers tributary

to the Columbia River downstream from McNary Dam which may be in conflict with the provisions of section 1 herein. Any condemnation action necessary under the provisions of this act shall be instituted under the provisions of chapter 120, Laws of 1947, and in the manner provided for the acquisition of property for public use of the state.

SEC. 3. The provisions of this act shall not apply to the waters of the North Fork of the Lewis River, nor the White Salmon River (Big White Salmon River).

SEC. 4. This act is necessary for the immediate support of the government of the State of Washington and its existing public institutions, and shall take effect April 1, 1949.

SECTIONS 46 and 49, CHAPTER 112, LAWS OF 1949, WASHINGTON, R.C.W. 75.20.050 and 75.20.100

SEC. 46. It is hereby declared to be the policy of this state that flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The Supervisor of Hydraulics shall give the Director of Fisheries and the Director of Game notice of each application for a permit to divert water, or other hydraulic permit of any nature, and the Director of Fisheries and Director of Game shall have thirty (30) days after receiving said notice in which to state their objections to the application, and the permit shall not be issued until the thirty (30) days period provided for herein has elapsed.

The Supervisor of Hydraulics may refuse to issue any permit to divert water, or any hydraulic permit of any nature, if, in the opinion o fthe Director of Fisheries or Director of Game, such a permit might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

SEC. 49. In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person or government agency shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fish-life in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon. If any person or government agency shall commence construction on any such works or projects without first providing plans and specifications subject to the approval of the Director of Fisheries and the Director of Game for the proper protection of fish life in connection therewith and without first having obtained written approval of the Director of Fisheries and the Director of Game as to the adequacy of such plans and specifications submitted for the protection of fish life, he shall be guilty of a gross misdemeanor. If any such person or government agency be convicted of violating any of the provisions of this act and continues construction on any such works or projects without fully complying with the provisions of this act, such works or projects are hereby declared a public nuisance and shall be subject to abatement as such.

Provided, however, That in case of an emergency arising from weather or stream flow conditions the Department of Fisheries or Department of Game, through their authorized representatives, shall issue oral permits to a riparian owner for removing any obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifiications.

PERTINENT SECTIONS FEDERAL POWER ACT
16 U.S.C.A. 791a et seq.

Sec. 797. *General Powers of Commission*

Sec. 4. The commission is hereby authorized and empowered—

* * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories) or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

Sec. 802. *Information to accompany application for license.*

Sec. 9. Each applicant for a license under this chapter shall submit to the commission—

* * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting ,and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

* * *

Sec. 803. *Conditions of license generally*

Sec. 10. All licenses issued under sections 791-823 of this title shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifiications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefits of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

Sec. 817. *Projects not affecting navigable waters; necessity for Federal license*

Sec. 23 (b). It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * *

Sec. 821. *State laws and water rights unaffected*

Sec. 27. Nothing contained in this chapter shall be constructed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

* * *

Sec. 825 l. *Rehearings; court review of orders*

Sec. 313 (a). Any person, State, municipality, or State commission agrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b). Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the license or public utility to which the order relates is located or has its principal place of business, or

in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject

to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

WILD LIFE RESOURCES ACT OF AUGUST 14, 1946
16 U.S.C.A. 662, as amended August 14, 1946

Sec. 662. *Impounding of waters; consultations between agencies; items and allocation of costs*

Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources, and the reports and recommendations of the Secretary of the Interior and of the head of the agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the Fish and Wildlife Service and by the said head of the agency exercising administration over the wildlife resources of the State, for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and

damage to wildlife resources, shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects.

The cost of planning for and the construction or installation and maintenance of any such means and measures shall be included in and shall constitute an integral part of the costs of such projects: Provided, That, in the case of projects after August 14, 1946, authorized to be constructed, operated, and maintained in accordance with sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 476, 491, and 498 of Title 43, and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior shall, in addition to allocations to be made under section 485h of Title 43, make findings on the part of the estimated cost of the project which can properly be allocated to the preservation and propagation of fish and wildlife, and costs allocated pursuant to such findings shall not be reimbursable. In the case of construction by a Federal agency, that agency is authorized to transfer, out of appropriations or other funds made available for surveying, engineering, or construction to the Fish and Wildlife Service, such funds may be necessary to conduct the investigations required by this section to be made by it.

No. 13,289

In the United States Court of Appeals for the Ninth Circuit

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; AND WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., A CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT,
CITY OF TACOMA, WASHINGTON, INTERVENER

BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

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APRIL 1953.

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BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

JURISDICTIONAL STATEMENT

This is a proceeding under Section 313 (b) of the Federal Power Act [1] to review an order of the Federal Power Commission (Commission) issued November 28, 1951 (R. 522–575).[2] This order issued a license, pursuant to Section 4 (e) of the Act, to the City of Tacoma, Washington, (City) authorizing the construction, operation and maintenance of the proposed Mossyrock and Mayfield water-power developments in

[1] 49 Stat. 851; 16 U. S. C. 791 (a) *et seq.* In lieu of printing as an appendix to this brief the numerous provisions of the Act, which we cite, we are lodging with the clerk pamphlet copies of the Act for more convenient reference.

[2] A timely application for rehearing filed by Petitioners was denied by Commission order issued January 24, 1952 (R. 579–582).

Lewis County, Washington, designated in the records of the Commission as Project No. 2016, and generally known as the Cowlitz Project.

In an earlier proceeding upon a declaration of intention to construct the proposed Cowlitz Project filed by the City, pursuant to Section 23 (b) of the Power Act,[3] the Commission found on March 8, 1949: (1) that the construction and operation of the Mossyrock and Mayfield developments would affect lands of the United States;[4] (2) that the developments could be so operated as to materially affect the navigable capacity of the Cowlitz River below the site of the proposed developments;[5] and (3) that the interest of interstate

[3] The material part of Sec. 23 (b) provides:

Sec. 23 (b) : * * * Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

[4] Less than 100 acres out of the more than 10,000 acres of land within the project area are lands of the United States.

[5] The Commission found the Cowlitz River to be a navigable water of the United States from its mouth to at least Toledo (river mile 34) and that it may be such a navigable water for

or foreign commerce would be affected by construction and operation of either or both of the proposed reservoirs.[6] Upon the basis of these findings the Commission ordered (8 F. P. C. 748–750) that a license be secured before the reservoirs were constructed.

Notice of the filing of the declaration of intention was sent to the Governor and to the Department of Public Utilities, State of Washington. Neither the State nor the City sought review of the Commission's jurisdictional findings or its order and Petitioners do not deny that the proposed Mossyrock and Mayfield developments are subject to the general licensing authority of the Commission, but contend that the Commission erred in other respects in issuing the license to the City for Project No. 2016.

COUNTERSTATEMENT OF THE CASE

Description of the Cowlitz project authorized by the Commission's order

As an aid to the Court we have inserted a map in the back of this brief, showing in profile and by geographical location, the proposed Mossyrock and Mayfield developments included in the license for the Cowlitz Project.

Mossyrock development

This development would be located on the Cowlitz River at about river mile 65 and would consist of a dam about 510 feet high creating a reservoir which

some distance upstream from Toledo. The Mayfield site is only 18 miles upstream from Toledo.

[6] These findings were also contained in the Commission's order of November 28, 1951, here under review (R. 538–539).

would extend about 21 miles upstream and would have a usable storage capacity of 824,000 acre-feet with a 100-foot drawdown; a power house integral with the toe of the dam with initial installation comprising three units of 75,000 kilowatts of capacity each, making a total capacity of 225,000 kilowatts, operating under a gross head varying from 325 to 225 feet, with provision for a fourth unit of the same capacity which may be added in the future; and a substation (R. 4104–06).

Mayfield development

This development would be located on the Cowlitz at about river mile 52 and would consist of a dam about 240 feet high creating a reservoir which would extend 13½ miles upstream to the Mossyrock dam and would have a usable storage capacity of 21,000 acre-feet with a 10-foot drawdown; an 880-foot tunnel to a power house downstream with initial installed capacity comprising three units of 40,000 kilowatts of capacity each, making a total capacity of 120,000 kilowatts, operating under a gross head varying from 185 to 175 feet, with provision for a fourth unit of the same capacity; and a substation with transmission lines connecting the two power plants to a substation on the outskirts of Tacoma (R. 4106–07).

Power benefits

The project will provide 345,000 kilowatts of installed capacity of which the average dependable capacity will be 275,000 kilowatts. The average annual energy output will be 1,400 million kilowatt-hours (R. 4114).

Fish conservation facilities

The two high dams in series would prevent the natural upstream and downstream migration of anadromous fish in the Cowlitz River and would affect those fishery resources. In order to conserve those resources the City proposes to provide a means of passing anadromous fish over or through the dams, both upstream and downstream. Further, by provision of fish hatchery facilities and through stream improvements, the City proposes to overcome any remaining adverse effects of the dams and, if possible, to enhance the fishery potential. In the interest of brevity, the fish facilities are not described in detail here but such a description is given in Appendix C to this brief.

The general plan is to pass the fish upstream over the dams by means of fish ladders or by trapping and hauling, or by both methods, if necessary, and to pass the young fish, or fingerlings, and adult fish downstream through the Mossyrock dam by means of a system for screening entrances to the turbines and by inducing the fish to enter water passages into the dam where they will be collected, depressurized, and released into the fish ladders. At the Mayfield dam there will be no collection chamber or depressurizing of the fish. The fish migrating downstream are to be screened near the surface in front of the tunnel intakes and passed directly into a fish ladder for descent into the natural channel below the dam (Ex. 14).

The plan to conserve the fishery resources was not presented as a final plan, and the Commission said it realized there were untried and novel features in the various means and methods proposed for passing fish upstream and downstream past the dams (R. 532–536, 548–549). Consequently, the Commission inserted provisions in the license requiring the City, before beginning construction of any permanent fish ladders or other fish-handling facilities, to make further studies, tests, and experiments to determine the probable effectiveness of such facilities and devices and to obtain Commission approval of the plans for such facilities. In addition, the City is required, in making such studies, tests and experiments, to cooperate with the United States Fish and Wildlife Service and the Washington State Departments of Fisheries and Game (R. 559).

The project, as licensed, will include such fish ladders, fish traps or other fish-handling facilities or fish-protective devices, as may be later approved by the Commission (R. 555), and the license provides that the City shall construct, operate and maintain such facilities for the conservation of fish and make such steam improvements and provide such hatcheries and similar facilities and comply with such reasonable modifications of the project structures and operation in the interest of fish as may be later prescribed by the Commission (R. 559–560).

Navigation and flood-control features

The substantial navigation and flood-control benefits to be provided by the Cowlitz Project are discussed in detail later, *infra* p. 42.

Interest of petitioners

There is no real controversy between the Petitioners and the City except for the question of fish conservation, and in the absence of that question the Petitioners would have no substantial basis for or interest in opposing construction of the project (Pet. Br. 3, 15). The other questions raised by Petitioners are pressed solely in an effort to invalidate the license on any possible grounds, whether or not related to the fishery issue, and not by reason of any other direct interest.

The Commission's conclusions and order

The Commission made detailed findings in support of its conclusion that the Cowlitz Project is best adapted to a comprehensive plan of development for all public purposes, including the conservation and preservation of the fishery resources of the Cowlitz River (R. 539–552). With respect to the fishery problem, the Commission concluded (R. 536):

> * * * The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near fu-

> ture when economic pressures will force its full utilization. With proper testing and experimentation by the City of Tacoma, in cooperation with interested State and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values.

Under these circumstances, the Commission entered its order of November 28, 1951, issuing a license for the Cowlitz Project (R. 537–575). It is this order which the Petitioners would have this Court set aside.

QUESTIONS PRESENTED

The petition for review raises the following questions for determination by the Court:

1. Do the provisions of the Federal Power Act, particularly Section 9 (b) thereof, require State approval of a proposed power project in order to validate a license thereunder?

2. Are State laws for the protection of fishery resources saved from supersedure by the Federal Power Act so as to invalidate a Federal license which is in conflict with such State laws?

3. Is a Federal Power Act license which is in conflict with State fishery laws made invalid because issued to a municipality, an agency of the State?

4. Does the record support the challenged findings upon which the Commission based its order issuing a license for the Cowlitz Project?

SUMMARY OF ARGUMENT

This case involves a controversy which has arisen between two important groups within the State of

Washington. One group, represented by Petitioners, insists upon the retention of the Cowlitz and other important rivers in their natural condition for the production of fish. The other group, represented by the City of Tacoma, believes that by intelligent planning the Cowlitz River can be made of greater usefulness to man without impairment of its ability to produce fish. The second group would not only follow fish-protection and fish-culture methods which have already been found to be effective, but also would initiate new means to solve new problems; and in addition would provide flood control and navigation and sanitation improvement and would materially add to the wealth of the area by the production of sizeable blocks of electric power which are urgently needed in the economic growth of the region.

The Commission considered the application of the City of Tacoma in accordance with the standards prescribed in the Federal Power Act for comprehensive development of the Cowlitz River as related to the Columbia River watershed and authorized a license under that Act with those conditions which it decided would protect all public interests and contribute to the economy of the region. Fundamentally the Petitioners rely upon the supremacy of State fishery laws, whereas it has been firmly established that Federal authority exercised by Congress in the Federal Power Act must be paramount.

The Commission, having authority to issue a license for this development, is required to prescribe reasonable license conditions which will protect and conserve those fishery resources as one of the public benefits

to be maintained in river development. The Wildlife Resources Act of 1946 is in accord with the Congressional policy of leaving to the Commission the determination of what recommendations by a State fish or wildlife agency shall be adopted in the issuance of Federal Power Act licenses.

The fact that the licensee in this instance is a municipality and therefore an agent of the State of Washington does not call for any determination by this Court in the review of the Commission's order, because such review is limited to the authority of the Commission to issue the order, not the authority of the licensee to carry out the provisions of the license.

The Commission's findings and order here are not only in accordance with law but are supported by substantial evidence. This Court, and the Supreme Court, have recognized the responsibility placed in the Commission by Congress to decide upon the measures best suited for water-power development and have recognized the limitation of the judicial function to an examination of the basis for the conclusions reached by the Commission rather than a judicial weighing of the evidence as proposed by Petitioners.

The Petitioners profess to be unaware of any power supply shortage in the Pacific Northwest, notwithstanding the frequent power curtailments which have been put into effect from time to time since 1948. During most of the time from 1946 through 1949 the runoff in the streams of the region was substantially in excess of minimum flows of record and consequently it was possible for the hydroelectric

plants, which supply the bulk of the load, to operate in excess of their dependable capacity. Nevertheless, in every winter since 1948 there have been shortages and even in the winter of 1949 to 1950, when the stream flow was better than average, it was necessary to drop large industrial loads. The plants in this area are interconnected and diversity of stream flows and loads is utilized to assist in meeting regional peak loads. But it has been necessary to drop substantial loads due to a lack of power supply as predicted by the Commission in its order of November 1951. Power studies by other agencies support the Commission's predictions that the power supply will not be adequate to meet the estimated loads in the future, including loads for defense industries. In suggesting possible substitute sources of hydroelectric power supply, Petitioners refer to power developments which are either under construction, or are already included in plans for providing future power supply to the region and, therefore, were considered by the Commission in determining the need for the Cowlitz Project.

In addition to the substantial blocks of power which the Cowlitz Project would make available to serve the needs of the City of Tacoma and other systems in the region, that project, through the Northwest power pool, would materially assist in stabilizing the power pool transmission operations and in meeting regional peak loads. Also, the Cowlitz Project will assist in reducing floods in the river downstream from the dams, will improve navigation and reduce pollu-

tion, as well as provide two large lakes suitable for recreational uses.

The Commission's conclusions with respect to the fish-protection measures which should be provided are also amply supported by the record, much of which came from witnesses of Petitioners. The Petitioners, of course, are primarily interested in conservation measures, but instead of cooperating to secure a large-scale laboratory in the Cowlitz Project facilities they have steadfastly refused to accept even the plain evidence before them. For example, the license requires the City to carry on extensive fish hatchery operations which the Petitioners regard as practically valueless notwithstanding the allocation, for fish hatcheries of the same type, of about half of the $20 million expenditure proposed under the Lower Columbia Fisheries Program which has otherwise been relied upon by the Petitioners. If fish hatcheries are unsuccessful, the State of Washington as well as other States in the Northwest and elsewhere are presently wasting considerable sums in other hatcheries in efforts to conserve anadromous fish similar to those in the Cowlitz.

The Commission recognized that additional study and experimentation will be required to solve the biological problems in connection with certain facilities proposed to pass anadromous fish upstream and downstream over or through high dams. Consequently, it prescribed measures for this purpose which, within the scope of present information, give every promise of success. The investment of $9,400,000 and the annual expenditure of some $610,000 is far in excess of the

net value of the fish which might conceivably be lost, even according to the liberal fish values suggested by Petitioners.

The Commission has not only given full consideration to the important problems facing it in this situation, but, as the agency made responsible by Congress for determination of these questions, has used every precaution possible to see that the wealth of the area is increased in accordance with sound conservation practices. The order should be affirmed.

ARGUMENT

I

The failure of the City of Tacoma to secure State approval for the Mossyrock and Mayfield dams is not a bar to issuance of a license for those dams

Petitioners contend that the Commission was without authority to issue its order licensing the Cowlitz Project because the City has not complied with applicable laws of the State of Washington (Pet. Br. 14, 29, 32, 58, 74), which are set forth in detail (Pet. Br. 33–37).

As these laws relate to the Cowlitz Project, their apparent purpose is to reserve the Cowlitz River in its present natural condition for the production of fish by prohibiting the construction of that project For the purposes of this review the principal State law to be considered is the "Sanctuary Act" which, if effective here, would bar construction of the Cowlitz Project.[7]

[7] The other State laws cited by Petitioners as a bar to the issuance of a valid license are less restrictive than the "Sanctuary Act" and, consequently, they would not be an effective bar to issuance of a valid license if the "Sanctuary Act" is ineffective.

There is no real controversy here with respect to water rights, as such. There is no evidence of record that the water-power use of the waters of Cowlitz River as proposed here would adversely affect or interfere with any vested water right acquired by other persons pursuant to State law.

State regulation of fisheries is subject to superior right of United States to regulate interstate and foreign commerce

As the very heart of their contentions here, the Petitioners say that the "Sanctuary Act" is for the purpose of protecting the fish life in public waters of the State, a purpose well within the police power of the State and, further, that the power to regulate fisheries was not among the powers delegated in the Constitution by the States to the Federal Government, being reserved exclusively to the States (Pet. Br. 41–44). But Petitioners mis-state the law when they contend that the State's authority over fisheries in navigable waters is in no way diminished by what they call the "qualified jurisdiction" of the United States over such waters (Pet. Br. 47).

The cases cited by Petitioners as placing fish lite in a special category do not support their contentions in this respect. *McCready* v. *Virginia,* 94 U. S. 391, the leading case relied upon by Petitioners, clearly recognizes that the State right of regulation of fisheries is subject to the superior right of Congress under the commerce clause. In that case, the Supreme Court said that so far as fish are capable of ownership while running, the States owns them but, said the Court (pp. 394–395):

> The title thus held is subject to the paramount right of navigation, the regulation of which with respect to interstate or foreign commerce, has been granted to the United States.

The assertion of Federal authority over fishery resoures which the Court found to be lacking in the *McCready* case will be found in the Power Act as we show later, *infra* pp. 16–20.

The supremacy of the Federal power over natural resources has been affirmed in other cases. In the case of *Toomer* v. *Witsell,* 334 U. S. 385 the Supreme Court held that a provision in the laws of South Carolina requiring non-residents to pay a license fee of $2,500 for each shrimp boat, and residents to pay only $25.00 violated the privileges and immunities clause of Article IV, Section 2, of the Constitution, and that another provision requiring owners of shrimp boats, fishing in the maritime belt off South Carolina, to dock at a South Carolina port, unload, pack and pay a tax on the catch before shipping or transporting it to another State, burdened interstate commerce in shrimp in violation of the commerce clause of Art. I, § 8, of the Constitution.[8]

In *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, the Supreme Court held that when the Federal

[8] See also *Foster Packing Co.* v. *Haydel*, 278 U. S. 1. In *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, decided on the same day as the *Toomer* case, the Supreme Court held invalid under the Federal constitution and laws a California statute which barred issuance of commercial fishing licenses to persons "ineligible for citizenship" and precluded such a person from earning his living as a commercial fisherman within three miles of the California coast.

Government, in the interest of navigation, deepened the channel across a navigable bay, the bed of which was used for oyster cultivation under grants from the State, the property of the lessor in the oyster beds was not taken within the meaning of the Fifth Amendment.

These cases show beyond a doubt that the right of the State of Washington to regulate the fisheries in the Cowlitz River is subject to the dominant and superior right of the United States to adversely affect those fisheries or, if necessary, to destroy them without compensation[9] in the exercise of the Federal authority under the commerce clause of the Constitution. Regulation of fisheries is an exclusive right of the State of Washington only for so long as the exercise of that power does not conflict with the exercise of some paramount Federal constitutional power such as the power to regulate commerce involved here.

The Federal Power Act authorizes this license

Apart from the unsupportable assertion that State police powers over fish and wildlife are among the powers generally reserved to the States, the Petitioners contend that the Federal Power Act does not purport to confer upon the Commission any authority to destroy or control the natural resources of a State (Pet. Br. 48–68). But the authority of the Commission in this respect is firmly established, although the

[9] Of course, there will be no destruction here. Under the license issued by the Commission the City of Tacoma, in cooperation with State and Federal agencies, must make every effort to conserve the fishery resources.

suggestion of Petitioners that the fishery resources of the Cowlitz River will be destroyed is wholly unfounded.

The licensing authority of the Commission rests upon the constitutional power of Congress to regulate commerce. The authority of the Federal Government over the navigable waters of the United States includes authority to create obstructions to navigation (*South Carolina* v. *Georgia,* 93 U. S. 4); to prevent obstructions in non-navigable tributaries where lower navigable capacity would be substantially impaired (*United States* v. *Rio Grande Irr. Co.,* 174 U. S. 690); to construct a dam across a navigable river for the purpose of improving navigation and controlling floods without first obtaining approval from the State (*Oklahoma* v. *Atkinson,* 312 U. S. 508; *Arizona* v. *California,* 283 U. S. 423); and to license under the Federal Power Act the erection of obstructions in navigable streams even without provision for the passage of vessels (*United States* v. *Appalachian Power Co.,* 311 U. S. 377; *First Iowa Coop.* v. *Power Comm'n,* 328 U. S. 152; *State of Iowa* v. *Power Comm'n,* 178 F. 2d 421, certiorari denied 339 U. S. 979).

Also, the United States is not liable for the impairment of economic interests resulting from river improvement (*United States* v. *Willow River Power Co.,* 324 U. S. 499; *United States* v. *Commodore Park,* 324 U. S. 386; *United States* v. *Chicago, M., St. P., and Pac. R. Co.,* 312 U. S. 592; *United States* v. *Chandler-Dunbar,* 229 U. S. 53; *Bedford* v. *United States,* 192 U. S. 217; *Scranton* v. *Wheeler,* 179 U. S.

141; *Gibson* v. *United States,* 166 U. S. 269). Therefore, the onus is not upon the Commission to sustain the recognized supremacy of the Federal power over navigable streams, but upon the Petitioners to show that the regulation attempted here differs materially from the Federal regulation already sustained by the Supreme Court, notwithstanding State laws.

The necessity for recognition of the supremacy of the Federal regulation provided by the Power Act is evidenced from its provisions and general purpose. While the Federal Power Act is a regulatory measure, the conditions under which licenses may be issued marks it as affirmative rather than merely prohibitory regulation. The Supreme Court pointed out in the *First Iowa* case (328 U. S. at 180) that the Power Act:

> * * * was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

Similar recognition of the affirmative purpose of the Power Act appears in *New Jersey* v. *Sargent,* 269 U. S. 328, 337; *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 424, 427–428.

In the *First Iowa* case, 328 U. S. at 181, the Supreme Court said that "the detailed provisions of the Act providing for the federal plan of regulation

leave no room or need for conflicting state controls." At the same time, the Court said that the evidence of compliance with the State laws called for in Section 9 (b) of the Act was purely for the information of the Commission (328 U. S. at 177). When the *First Iowa* controversy came up the second time, the Commission had issued a license without any showing that the applicant had complied with the State laws for the water-power use of the navigable Cedar River, notwithstanding a prohibition in the State law against the diversion proposed. The validity of the license was directly affirmed in *State of Iowa* v. *Power Comm'n, supra.*[10]

The sanctity of State laws, moreover, was directly asserted in the *Appalachian* case, *supra,* as a separate ground against the validity of the license there offered under the Power Act. Forty-one States joined with the Power Company in objecting to the issuance of a license carrying the acquisition clause of Section 14 of the Act on the ground that if the Federal Government could take over a natural resource such as water-power, it could as logically allow "similar acquisition of mines, oil or farmlands as consideration for the privilege of doing an interstate business. The states thus lose control of their resources and

[10] Another Court of Appeals recently held that the cost of water-power rights alleged to have been acquired under State law was properly chargeable as project operating expense, *Niagara Mohawk Power Co.* v. *F. P. C.*, C. A. D. C., case No. 10,862, decided December 31, 1952. However, the court there was not required to rule upon the necessity for compliance with State laws to validate operation of the project under the F. P. C. license. One judge dissented and a petition for certiorari has been filed.

property is withdrawn from taxation in violation of the Tenth Amendment" (at 421). Nevertheless, the validity of the license was upheld by the Court and the license conditions to which objection was made were held to have an obvious relationship to the exercise of the commerce power. "The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment" (at 427).

The license for the Cowlitz Project was issued for the development of a navigable stream and for project works to occupy lands of the United States and affect lower navigable capacity. Such projects are clearly authorized by the Act.

Rather than repeat here the legislative history, the background material, and the particular provisions of Part I of the Federal Power Act which show that Congress delegated to the Commission the sole responsibility to determine what projects should be licensed under that Act, we respectfully refer the Court to our discussion of those subjects appearing at pages 17–20 of our brief in *State of Oregon* v. *Federal Power Commission,* No. 13,345, and pages 19–23 of our brief in *United States* v. *Federal Power Commission,* No. 13,265, filed in this Court in February and March 1953, respectively.

The Commission has the authority and duty to prescribe fish-protective measures

Petitioners contend that even if the "Sanctuary Act" does not invalidate the license the laws of the State must govern insofar as fish-protective measures are concerned. Petitioners say that the State legislature has reserved the use of the waters of the Cow-

litz River for anadromous fish and has prohibited other uses which would interfere with that use and they contend that Section 27 of the Federal Power Act prohibits the Commission from interfering with the determination of the State to so use those waters (Pet. Br. 47–48).

Aside from the limitation of Section 27 to State laws protecting consumptive water uses, Petitioners overlook Section 18 of the Power Act which provides that the Commission "shall require the construction, maintenance, and operation by a licensee at its own expense of * * * such fishways as may be prescribed by the Secretary of Commerce [Secretary of the Interior]." Had Congress intended by the provisions of Section 27 to reserve to the States the right to the exclusive use of waters of navigable streams for anadromous fish or to make the validity of a license depend upon State approval of fishery facilities, there would have been no need for the provisions of Section 18. In that section Congress directed specifically what action the Commission should take with respect to fishways without regard to State law on the subject.

That Congress did intend to assert Federal control over fish and wildlife resources affected by Federal water projects and by projects to be constructed by *any public or private agency under Federal license,* is furthermore clearly demonstrated by the Wildlife Resources Act of August 14, 1946 (60 Stat. 1080, 16

U. S. C. 661),[11] which provides a procedure for State and Federal cooperation with a view to preventing loss or damage to fish and wildlife resources affected by any such project. This 1946 statute requires that "due consideration be given to the requirements of those resources [fish and wildlife] as well as the requirements of such other resources as may be affected by those programs," as stated in House Report No. 1944, 79th Congress, 2d session.[12] The application of that Act here would require the Federal Power

[11] The statutory provision in question is Sec. 2 of the Act of August 14, 1946, which reads as follows:

"Sec. 2. Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources, and the reports and recommendations of the Secretary of the Interior and of the head of the agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the Fish and Wildlife Service and by the said head of the agency exercising administration over the wildlife resources of the State, for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and damage to wildlife resources, shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects."

[12] See also Senate Report No. 1698 and Senate Report No. 1748, both of the 79th Congress, 2d session, on H. R. 6097, and also statement by Representative A. Willis Robertson, author of the bill, at pages 12 and 14 of the Hearings before the House Committee on Agriculture, February 13 and April 15, 1946.

Commission to consult with the local agencies, in this instance the Washington State Fisheries and Game Commissions, and to obtain their recommendations with respect to the fish and wildlife resources affected by the Cowlitz Project. But there is no provision in the 1946 Act requiring the Commission *to adopt* the recommendation of any State agencies. Insofar as the 1946 Act is concerned, the final decision as to how the fishery resources problem is to be handled is left up to Congress in the case of a Federal project, and is left up to the Federal Power Commission in cases involving projects licensed under the Federal Power Act.[13]

As we have shown (*supra* pp. 14–16), the United States may, in the execution of its constitutional power over interstate or foreign commerce, adversely affect or destroy fishery resources in navigable waters of the United States. Having this authority, the United States may provide measures for the protection of those fishery resources, particularly where the State agencies concerned (Petitioners here) have refused or failed to recommend such protective measures, and under the provision of Section 18 and other sections of the Act the Commission is under a duty to prescribe such measures.

Whether the City, as a municipal corporation, may proceed with the project under Federal license is not a proper question for decision here.

Petitioners challenge the authority of the City, a municipal corporation as distinguished from a private corporation, to proceed with construction and opera-

[13] See *State of Iowa* v. *F. P. C.*, *supra*.

tion of the Cowlitz Project under its Federal license in derogation of the State "Sanctuary Act". (Pet. Br. 68)

This question is not before the Court. Section 4 (e) of the Power Act expressly authorizes the issuance of licenses to municipalities and Petitioners do not say that the City of Tacoma is not a municipality within the meaning of the Power Act. The review sought by Petitioners here goes solely to the validity of the Federal license. In the Power Act Congress made no attempt to regulate those matters which are of purely local concern,[14] but limited itself to those statutory provisions which would insure effective national control over water power development. *First Iowa Coop.* 328 U. S. at 181. The applicability of State laws to the Commission's licensee, the City of Tacoma, as a State agency is raised in a proceeding in the Superior Court of the State of Washington for Thurston County, *City of Tacoma* v. *Taxpayers,* et al., No. 32,411.

II

The Commission's findings here are in accordance with law and are supported by substantial evidence

Petitioners argue that the basic findings and conclusions in the Commission's opinion and order (R. 522–562) are not supported by substantial evidence and that the Commission has exceeded the power con-

[14] See remarks of Representative William L. La Follette of Washington, a member of the Special Committee on Water Power, which reported the bill that became the Power Act, 56 Cong. Rec. 9810.

ferred upon it, has not fulfilled the obligation imposed upon it by Section 10 (a) of the Federal Power Act to approve only comprehensive plans, and has acted arbitrarily and capriciously (Pet. Br. 14–15, 18–28, 29–30, 75–109).

Scope of review.—With respect to the scope of court review permitted under the Power Act, Section 313 (b) provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

The scope of court review permissible under the Act was recently defined by the United States Supreme Court in *United States* v. *Federal Power Commission, et al.,* decided March 16, 1953. In affirming an order of the Commission issuing a license for a water power project on the Roanoke River, at Roanoke Rapids, North Carolina, over the objections of the Secretary of the Interior, the Court said (73 S. Ct. 609, 619):

> Subordinate arguments are made bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it

> cannot, that the judgment which it exercised had no basis in the evidence and so was devoid of reason.

The Court may not substitute its judgment for that of the Commission. As was said by the Supreme Court in *National Labor Relations Board* v. *Link Belt Company,* 311 U. S. 584, 597:[15]

> Congress entrusted the Board, not the Courts, with the power to draw inferences from facts. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461. The Board, like other expert agencies dealing with specialized fields (see *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 304), has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony.

This Court properly defined its permissible scope of review under the Federal Power Act in *Montana Power Company* v. *Federal Power Commission,* 112 F. 2d 371, when it said (p. 374):

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[15] See and compare, also, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 231; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *International Assoc. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 542; *Dobson* v. *Commissioner*, 320 U. S. 489, 501–502; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 659–660.

> The Commission is required to exercise its judgment, as provided in § 10 (a) of the act. The license to be issued is subject to the condition that "the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development * * *." The act leaves to the discretion of the Commission what project shall "be best adapted to a comprehensive plan" for such improvement and utilization. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146, 59 S. Ct. 754, 765, 83 L. Ed. 1147, and cases there cited.

As we show *infra* pp. 27–55, there is a rational basis in the evidence of record to support the Commission's judgment in issuing the license for the Cowlitz Project.

Neither the Army Engineers' 1948 Comprehensive Plan nor the Lower Columbia Fishery Plan is a bar to issuance of the license here

Petitioners contend that the Commission's finding No. 59, made pursuant to Section 10 (a) of the Act, operates to destroy the established comprehensive plan of the Lower Columbia River Basin area and the Lower Columbia Fishery Plan (Pet. Br. 30, 76–80). The Commission gave full consideration in its Opinion and Order to this contention (R. 527–529, 547–548), and set forth fully its reasons why, in its judgment, it was not in the public interest to deny the license for the Cowlitz Project.

Petitioners claim that the Army Engineers 1948 Review Report on the Columbia River (House Doc.

No. 531, 81st Cong. 2d Sess.) recommended indefinite postponement of any water-power development on the Cowlitz River and also claim that issuance of the license would be contrary to the Lower Columbia Fishery Plan (Pet. Br. 76–80). But, as the 1948 Review Report shows (R. 408) the power from the Cowlitz Project was not required in the area when that report was being prepared because adequate power was then available from other sources.

The adequacy of the supply prior to 1948 was pointed out by the Commission in its November 1951 order, but by 1951 the increased demands had made the available supply wholly insufficient and new generating sources were required. The Commission, in reporting on the Army's comprehensive development plans, confined itself primarily to power features of the proposals. It called attention in 1951 to the restricted scope of its earlier study of the 1948 Army Review Report, and said it had not previously considered the fishery measures (R. 527–529). Also, of course, Congress has not approved the 1948 Review Report or the Lower Columbia Fishery Plan, both of which are still being revised (R. 552). Comprehensive plans are, of necessity, flexible in order to meet changing conditions.

There is a rational basis for the Commission's conclusion that the Cowlitz Project is best adapted to a comprehensive plan of development

Petitioners would have this Court believe that the Commission, with callous disregard of local interests and by arbitrary and capricious exercise of the power conferred upon it by the Power Act, authorized the

destruction of valuable fishery resources through construction of this power development in such a way as to completely prevent the use of a large portion of the stream for any other purposes, including the propagation of fish, with its attendant loss in recreational and commercial values. This was not the case, but on the contrary, the Commission took into account a substantial investment in excess of $9,400,000 (R. 550) proposed by the City and large annual expenditures ($610,000, R. 550) to provide adequate fish conservation facilities and required further that studies, tests and experiments be made by the City in cooperation with Petitioners, prior to construction, to determine the best methods and measures to preserve the fishery resources (R. 559).

The efforts of the City to devise and provide adequate measures to protect the fishery resources would also give an opportunity to the Federal and State fish conservation agencies to use the Cowlitz Project without expense to them as a full scale laboratory for testing and devising adequate means of passing anadromous fish upstream and downstream past a high dam, an opportunity that has not heretofore been afforded to those agencies primarily interested in preserving the recreational and commercial values inherent in the anadromous fish runs of the Columbia River Basin.

Petitioners would preserve the fishery values of the Cowlitz River by preventing any utilization of these water resources for the development of power, for the control of floods and abatement of pollution in the

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lower stretches of the river, for the improvement of navigation, and by the creation of two lakes having substantial recreational value, notwithstanding the extraordinary measures directed to harmonize the several types of water use.

The several values of these water resources were recognized by the Commission in its finding that the proposed development would be best adapted to comprehensive development of the water resources of this region (R. 552):

> (59) Under present circumstances and conditions and upon the terms and conditions hereinafter included in the license, the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.

This finding or conclusion, which conforms to the provisions of Section 10 (a) of the Power Act,[16] is

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[16] Section 10 (a) provides, in part:

Sec. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

the ultimate and only conclusion relating to the beneficial public purposes (including conservation of fish and recreation) required by the Act.

The following analysis of the evidence is presented to demonstrate to the Court that there is not only substantial evidence to support the Commission's findings and order, but that the Commission reached the only reasonable conclusion that could be reached under the facts and law presented.

The challenge of Petitioners to the factual findings and conclusions of the Commission may be divided into two categories: First, those relating to electric power, and second, those relating to the fishery resources of the Cowlitz River. Within the limits of this brief it is not feasible to present a detailed analysis of the factual record upon which the Commission acted. However, substantially the same factual analysis as was presented by the Commission's staff counsel during the proceedings before the Commission appears in the Appendix hereto.

The Commission's findings relating to electric power are adequately supported

The arguments of Petitioners on electric power are found in their brief at pages 19–23, 30 and 80–90.

A. Power situation in the Pacific Northwest

The electric utility systems operating in the Pacific Northwest (Ex. 53, p. 9; Ex. 54) are interconnected and their operations are coordinated (R. 1060–70). The Northwest Region was deficient in dependable power capacity to supply the electric load and to provide adequate capacity reserves from 1946 to 1949

(R. 1073–75, 4111–13, 4144–45, 4149; Exs. 53, 54). Although during those years the amount of load actually carried was in excess of dependable capacity because river flows were in excess of those experienced during an earlier period of most adverse stream flow—also called the period of critical water conditions (R. 1074, 4181)—there was a shortage of power in the Pacific Northwest during the winters of 1947–1948 and 1948–1949 (R. 915). Even when the flow was better than average it was necessary to drop 80,000 kilowatts of industrial load in 1949–1950 (Ex. 23, p. 35). During 1950–1951 a power deficiency was estimated for the Pacific Northwest, and the loads were increasing faster than estimated, due to some industrial activity in the defense program (R. 1067–68, 1086–87, 1123; Ex. 23, pp. 8–10; R. 395–396).[17]

The Commission's estimate of the power shortages was confirmed by the Bonneville Power Administration 1952 Advance Program for Defense[18] which shows (p. 19) that deliveries to some industrial plants were curtailed in the winter of 1951–1952. It is common knowledge that there was a serious power shortage during the winter 1952–1953 in the Pacific Northwest, and the Defense Electric Power Administration had to institute a sizeable power curtailment program which reduced substantially the supply of electric

[17] See also Bonneville Power Administration 1951 Advance Program for Defense, pp. 26–27. This program is similar to that appearing in the record as Exhibit 23, except that it is for the year 1951 instead of 1950.

[18] The 1952 program is similar to that appearing in the record as Exhibit 23, except that it is for the year 1952 instead of 1950.

service to important defense loads.[19] These power shortages are attributable in part to inability to maintain the Federal construction schedules of the estimated times when new Federal and non-Federal generating units would come into operation (R. 917–918, 1192, 1231–36, 1375–76; Exs. 21, 23).

The record contains several estimates of future electric loads in the Pacific Northwest (Ex. 21, p. 6; Exs. 23, 24, 54, 55), but such estimates do not include national defense load requirements (R. 4149–51, 4190–91, 4194). The program of future power supply, identified as Schedule S in Exhibit 23, was at the time of the hearings the most recent formalized plan for providing new generating capacity for years up to 1960 (R. 4187–4188). Comparison of these load estimates, which do not include defense loads, with the Schedule S program of power supply (Ex. 23) shows, as found by the Commission (R. 543), that there will be a deficiency in dependable power supply for serving loads and providing required reserves until almost 1960 (R. 4151; Ex. 54).

A speed-up construction program was being prepared at the time of the hearings to provide new sources of electric power supply for defense loads (R. 4187–91). This program for construction of new generating facilities is contained in the Bonneville Power Administration 1951 Advance Program for Defense (R. 395). Table 17 (p. 31) of that Advance Program confirms the Commission finding (R. 543) that there will not be sufficient power to

[19] See Appendix D for details.

supply loads plus 6.7 percent required reserves (R. 1075), until after 1959.

The B. P. A. 1952 Advance Program for Defense shows (p. 37) that there will be an energy deficiency until after 1961, assuming critical stream flow conditions. Comparison of energy supply and demand data on Schedules B and D of the 1952 Advance Program shows that even in a median water year the energy shortage will continue through 1958 and may recur again in 1960–1961. These "Advance Programs" indicate that the Cowlitz River plants could be built in two years. Thus, if these two plants were constructed, the estimated power shortages would be reduced to the extent of their capacity and energy capability, their dependable capacity being 275,000 kilowatts. These later studies by the Bonneville Power Administration confirm the Commission's findings relating to the power shortages in the Pacific Northwest and the value of the Cowlitz Project in alleviating the deficiency.

Petitioners' basic error in their evaluation of the power situation in the Pacific Northwest is their insistence upon using the power supply available under median stream flow conditions as their criterion in attempting to determine the "firm power" supply (Pet. Br. 81–82). Contrary to Petitioners' contention, one may not determine "firm power with median water conditions" (Pet. Br. 82), because firm power must always be available when needed and it is obvious from the use of the term "median" that median

stream flows are not always available when needed.[20] The amount of firm power available from a hydroelectric plant is correctly determined by computations based upon flows which have occurred in the past during the period of most adverse stream flow of record and the same standard is used to determine dependable capacity—the true criterion of the dependable capability of a hydroelectric plant (R. 605, 612–614, 4110–11, 4144–50). The method of determining dependable capacity based upon critical stream flow conditions is used, almost without exception, by the utility industry and by the Federal power agencies.[21]

The estimates by Professor Robbins of the future power supply and loads, relied on by Petitioners (Pet. Br. 82), were demonstrably not adequately prepared. He did not make the required estimates of future peak loads and annual energy requirements (R. 2050–52); he used installed capacity (which is greater than dependable capacity) rather than dependable or firm capacity (Ex. 26); he made no stream-flow studies and no reservoir operational studies (R. 2060); and he related the speed-up defense program of power supply to a normal load need and thereby ignored the defense increment of load (Ex. 26). No logical conclusions were drawn by the Commission nor can any be drawn from the estimates of

[20] Power available under median stream flow conditions is available only 50 percent of the time and the amount of power available on the system decreases as stream flows decrease below median.

[21] The Commission has for many years prescribed this method of determining firm or dependable power capability of hydroelectric plants in annual reports filed by public utilities and licensees.

Professor Robbins because of the many deficiencies in his study.

Contrary to the inference by Petitioners that the testimony of Mr. McManus, then Administrator of Defense, Electric Power Administration, indicates that there will be an ample power supply to meet electric loads by 1955 to 1956 (Pet. Br. 82), his testimony merely shows a power shortage limited to that period because the load studies of the Defense Power Administration are prepared for only four years in advance and, consequently, he gave no consideration to the question whether the shortage would continue beyond 1956 as did the Commission staff in its studies of power supply and demand. In fact, he did not say how long the power supply would be critical in the Pacific Northwest (Ex. 64B).

To appraise properly the other data relative to power supply referred to by petitioners, namely, the City's Exhibit 10, plate 19, and Exhibit 23, it is also necessary to take into account required generating capacity reserves of 6.7 percent (*supra,* pp. 33–34). By taking into account the required reserves, the estimate of the shortage period extends to about 1960.

The large curtailment of power in the Pacific Northwest during the winter of 1952–53, brought on by stream flows less than median, refutes the contentions of Petitioners that a completely erroneous impression of the present power situation in that region has been created by the City and that the Commission committed a basic error in using a "critical water year" in evaluating power supply (Pet. Br. 81).

Petitioners contend that the Commission should have considered the Yale Project and six additional generating units at Rock Island Project, all then under construction, as alternate projects for the Cowlitz Project (Pet. Br. 84). The additional units at Rock Island were scheduled for construction at the time of the hearings (Ex. 23, p. 30), and the capacity to be provided by those units was included as part of the future power supply in the studies by the Commission staff (R. 4144, 4149–50, 4187). The capacity of the Yale Project and the additions at Rock Island Project, as well as other proposed private power projects, were also included (p. 14) in the B. P. A. 1951 Advance Program for Defense (R. 395–396), and were considered by the Commission as part of the power supply for defense loads (R. 542–543, findings 13 and 18).

Petitioners complain that the findings of the Commission made no reference to 400,000 kilowatts of steam-electric capacity that might be constructed in the Pacific Northwest by the Federal Government (Pet. Br. 84–85). The proposal to construct Federal steam-electric plants was known to the Commission (R. 396, 4297, 4332) but such plants have not been authorized for construction by Congress. Under the circumstances, the Commission was justified in refusing to rely upon the availability of this purely speculative steam-electric capacity, and it had no basis for assuming that such capacity would be an alternative source of power supply to the proposed Mossyrock and Mayfield projects on the Cowlitz River.

It appears that the Commission exercised good judgment in refusing to assume early construction of the proposed Federal steam-electric plants in the Pacific Northwest because the Eighty-second Congress failed to authorize them and to our knowledge no bill is pending in the present Congress which, if enacted, would authorize their construction. Even if steam-electric plants should be authorized in the Pacific Northwest, they would be for the purpose of firming up the hydroelectric power (R. 4332).

B. Power needs for national defense

In their desire to protect the fishery resources of the Cowlitz River, Petitioners seize upon the idea that the output from the proposed Mossyrock and Mayfield plants is not necessary for defense (Pet. Br. 86–87).

At the time of the hearings national defense loads were coming on the power systems in the Pacific Northwest (R. 1087, 1097, 1140–41, 1402–04) and interruptible loads were mostly those of the aluminum plants (R. 915–916, 1079, 1377–78). Since that time the power situation has become more serious in that the industrial loads being served on an interruptible power basis produce materials essential to the national defense.[22] Thus these electric loads, which would have been dropped during normal peace-time operations in event the decreasing power supply approached that available during minimum stream-flow conditions, have acquired the status of firm loads because of the

[22] See Bonneville Power Administration 1951 Advance Program for Defense (pp. 26, 27, and 32).

national defense value of their products. Consequently, it is necessary in the Pacific Northwest to institute region-wide curtailments of electric load whenever power supply decreases substantially from that available in a year of median stream flow as was done in the fall and winter months of 1952–1953.

Although not charged with any official responsibility for power distribution, Petitioners would argue that restriction of the amounts of power used by theatre marquees, neon signs, etc., would save sufficient energy to serve defense loads in the event of a shortage of water for power generation (Pet. Br. 86–87). Actually such a program would be hard to police. Defense Electric Power Administration in its curtailment program of 1952–1953 apparently did not consider that enough energy could be saved by restricting energy to only such commercial users. Instead, DEPA instituted a program in November 1952 banning the sale or use of power to serve interruptible loads in the Pacific Northwest, including some defense loads, and ordering a cut of 10 percent in the supply of firm power serving loads in excess of 8,000 kilowatt-hours weekly. In addition, smaller users of power were urged to curtail their use of power on a voluntary basis.[23]

The Commission has just been through World War II and has observed the limiting effect of shortage of critical materials on the production of generating facilities. The same situation is here now. The Commission, in its day-to-day dealings with the electric

[23] See Appendix D for more details.

utility industry, is kept informed of the power situation and the Commission found that "the severe power shortage in the Pacific Northwest is a matter of national concern" (R. 524). During 1952, about 2,500,000 kilowatts of steam-electric generating capacity scheduled for service in other areas will not be available until 1953 because of shortage of materials.[24] The situation in 1953 is not likely to be better, and the shortage of materials may well continue for several years thereafter. Since hydroelectric power plants do not require critical alloy steels, they are not so adversely affected by such shortages.

Petitioners ignore in their arguments certain basic characteristics of the electric power industry. Electric load growth is beyond the control of an electric utility except where restrictions are placed by governmental authority on the taking on of certain loads. Power supply must always be equal to, or greater than, the electric load at all times, and, if it is not, the electric supply system will slow down and fall apart. This means that in the event of a power shortage, electric loads must be reduced to a point where their total is equal to, or less than, the available power supply. As a practical matter, and to be effective in a power curtailment program, the large loads have to be reduced in spite of their great importance to the national defense.

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[24] Non-availability of this scheduled steam-electric generating capacity is shown by reports filed with the Commission by electric utilities, particularly FPC Form No. 12–E, Monthly Power Statements.

C. The Proposed Cowlitz River Power Project would provide substantial benefits

The proposed Mossyrock development with initial insallation of 225,000 kilowatts, plus the proposed Mayfield development with initial installation of 120,000 kilowatts,[25] would be located about 60 miles from the City of Tacoma (R. 4104–07). This Cowlitz River development of 345,000 kilowatts initial installed capacity would have an average dependable capacity of 275,000 kilowatts over a 50-year period and would produce an average annual output of about 1,400 million kilowatt-hours (R. 4114). If such output were produced by a new steam-electric plant located in the City of Tacoma, the cost of dependable capacity (exclusive of taxes) would be $14.15 per kilowatt per year, based on 2 percent cost of money, and the cost of energy (exclusive of capacity or fixed costs) would be 3.75 mills per kilowatt-hour (Ex. 52). Based on such unit cost figures, alternative steam-electric power in the amount of 275,000 kilowatts, plus 1,400 million kilowatt-hours, would have a total cost of $9,141,250 per year, or an average total cost per kilowatt-hour of 6.53 mills. In the economic evaluations, credit was given to replacement of steam-electric energy by off-peak hydro energy at a cost of 2 mills per kilowatt-hour, and it was determined that the Cowlitz Project, exclusive of the costs of fish-handling facilities, will have an average annual excess of power benefits over

[25] The City has an application pending with the Commission for authority to install a fourth unit initially in each powerhouse. The installation of the two additional units would increase the inital capacity of the project from 345,000 kilowatts to 460,000 kilowatts.

power cost of $1,700,000, based on an interest rate of 2.0 percent (R. 4115–17), and the Commission so found (R. 546). This sum was used as net power value in the economic feasibility studies.

Contrary to the contention of Petitioners (Pet. Br. 23) the Cowlitz Project will provide substantial flood control and navigation benefits. The proposed method of operation of the Mossyrock reservoir required by the license would provide 260,000 acre-feet or more flood control which would reduce the flood of record on the Cowlitz River from 140,000 cfs at Castle Rock (about 35 miles downstream from Mayfield), to bank full capacity of 70,000 cfs at Castle Rock where considerable damage was caused by the December 1933 flood (R. 795–797, 1279–80; Ex. 5, Ex. 10, Pl. 8, Exs. 11, 21). The minimum average flow of the Cowlitz River between Toledo and Castle Rock would be increased from about 1,000 cfs to 2,000 cfs, and the resulting navigation benefits will be direct, and of increasing usefulness adding at least six inches to the navigable depth over shoals (R. 797, 1277–79; Ex. 5). Also, this increase in low flows from 1,000 to 2,000 cfs should be beneficial to fish life, as it would lower the concentration of harmful pollution (R. 2209–10, 2275–77, 2976–77, 3788).

Because of its proposed location and size, the Cowlitz Project would provide essential synchronizing power at an essential point in the Northwest power pool and thereby increase the stability of the electrical network (R. 1148–49, 1285–86); would reduce power flows on transmission lines of Bonneville Power Administration carrying power from the eastern part

of the State of Washington to the Tacoma-Seattle load area and would thereby effect a saving in transmission-line losses (R. 1098–99); would improve service to the western part of the State of Washington through reducing disturbances to loads and amounts of load shedding[26] (R. 921–922, 1088–90, 1102–07, 1125–28, 1282–83); would, due to diversity of stream flows between the Cowlitz and Columbia Rivers, provide a block of power to the Northwest pool in addition to its own system dependable capacity at time of over-all system peak loads (R. 1117–18, 1285–86, 1677; Ex. 55); and would, at time of floods on the Columbia River, provide assistance to the Portland area when generation is seriously curtailed at the Bonneville power plant (R. 1284–85). In order to test the Cowlitz Project by the most severe economic standards, not one of these many additional benefits was assigned a dollar value for use in the economic feasibility studies.

The proposed Cowlitz Project will provide two lakes which will offer recreational opportunities because of their easy accessibility and availability of nearly full reservoirs during the seasons when recreational use would be greatest (R. 1280–81, 1627, 1631; Ex. 10, Introduction, p. 1). The creation of large projects with reservoirs brings many visitors and recreational facilities are usually provided to serve the public (Army Engineers Columbia Review Report, House Doc. No. 531, p. 98).

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[26] Load shedding means dropping load through inability to supply it for any reason.

The installation at the Cowlitz Project of 345,000 kilowatts initially, and 460,000 kilowatts ultimately, would assist in alleviating the power shortage in the Pacific Northwest (*supra* pp. 34, 41–42; Ex. 21, p. 20). It would also ease some of the restrictions on taking on of new load by the City and also provide more freedom in formulating electric sales policies (R. 1266, 1288–89, 1376, 1419, 1663–64, 1679–81). Section 9 (d) of the contract under which the City purchases power from the Bonneville Power Administration provides that Bonneville will consult with the City before Bonneville serves loads of 15,000 kilowatts or more in the areas served by the City, or serves loads of 2,000 kilowatts or more in the area where the City expresses a desire to serve (R. 638). As the contract provides for consultation only, and not approval by the City before Bonneville takes on such loads, the City would not be assured of a power supply from Bonneville to serve such loads, except upon the pleasure of Bonneville. The construction of the proposed Cowlitz Project would remove this limitation on the power supply available to the City.

The license for the Cowlitz Project was accepted on January 10, 1952 (R. 561–62). If construction should start by January 1954, part of the project could be in service by January 1956 and the rest shortly thereafter (R. 47, 1177, 1276–77; Ex. 648). This still would be in time to provide a sizeable addition to the power supply of the Pacific Northwest and alleviate part of the power shortage. Furthermore, in considering the capability of the Cowlitz Project to alleviate the power shortage the Commis-

sion was not required to assume that there would be the delay in construction of the project resulting from this review proceeding.

D. The economics of the proposed Cowlitz Project

In the consideration of the economics of the proposed Cowlitz Project there was before the Presiding Examiner and the Commission a comprehensive analysis of the economics of the fishery resources of the Cowlitz River in relation to the conservation program proposed by the City (R. 74, 116, 134–135) and a similar analysis of the value of Cowlitz power as compared to the value of the fishery resources which might be adversely affected. These analyses are contained in Appendices A and B.

Petitioners contend that the Commission erred in refusing to deny the license on the ground that the Cowlitz Project is not needed and will be of no value to the region since equivalent power may be obtained by construction and operation of new steam-electric generating plants (Pet. Br. 88). In advancing that contention, Petitioners entirely ignore the economics of resources development. They would reserve the Cowlitz River solely for fish production without regard to the savings in power costs to be realized by power development through the Cowlitz Project in lieu of steam-electric power development, not to mention the substantial flood control, navigation and recreational benefits that will accrue to the region through construction and operation of that project. Under Petitioners' theory of economics no

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further waterpower development would be permitted in any salmon stream, whether or not the fishery resources therein are of substantial value, because, say Petitioners, all the power needed now and in the future may be produced in new steam-electric generating plants. The fact that the cost of such steam-electric power would be substantially higher than equivalent power to be produced by waterpower is immaterial under Petitioners' theory.

Petitioners' claim that the $1,700,000 net power value of the Cowlitz Project found by the Commission is too high (Pet. Br. 87), but they have failed to point out any errors in the finding. In addition to this net power value, there are other benefits to be contributed by the Cowlitz Project (*supra,* pp. 42–44) which, in the interest of ultraconservatism, were not assigned any dollar value by the Commission in its consideration of the economics of the project.

It is suggested by Petitioners that the net power profits from the proposed Cowlitz Project would inure to the City whereas destruction of the Cowlitz fishery resources would result in a loss to the entire State of Washington (Pet. Br. 87–88). The City sells power at cost so it does not make a profit (R. 1286–87; Exs. 12, 13). Further, the City as a member of the power pool operating in the Pacific Northwest, would provide power to interconnected systems and the benefits thereof would be State-wide at least (R. 1288–89, 1376, 1415–20). If the City should find it necessary to build steam-electric plants instead of the Cowlitz Project, its customers would have to pay at least $1,000,000 per year more for power. It is a cardinal

principle of the electric power industry, including publicly owned systems, to provide new increments of power supply at the then lowest possible cost. Contrary to Petitioners' contentions (Pet. Br. 88) the fishery values used by the Commission are all based on testimony and exhibits prepared by Petitioners' fishery experts (see Appendix A).

Petitioners suggest that sources other than the Cowlitz Project are economically feasible, that power from those sources can be marketed at the same rate of six mills to be charged for Cowlitz power, and that the Cowlitz power has no value to the region over and above that capable of being produced from other sources (Pet. Br. 88–89). The rate of six mills is the rate required to pay for the cost of Cowlitz power plus transmission and distribution costs (Exs. 12, 13). Obviously, since steam-electric power would cost at least $1,000,000 more per year than Cowlitz power, steam-electric power would have to be sold for more than six mills per kilowatt-hour in order to pay the additional annual cast of $1,000,000. There is no evidence in the record to show how much hydro power from sources other than the Cowlitz Project would cost or whether such power would be as economical due to the greater transmission-line costs (R. 393–396). If the economic theories of Petitioners were to be considered seriously, it would follow that an electric utility no longer need give any attention to the matter of obtaining the lowest cost sources of new power supply in order to serve the ultimate consumers at the lowest possible rates. Rather, Petitioners would ignore the costs because the consumers would have to pay the

bills. Such a theory of economics is lacking in merit and soundness and clearly would not be in the public interest.

The allegation of Petitioners that the Commission gave insufficient consideration to recreational benefits (Pet. Br. 89) is not supported by the record. A full analysis of the recreational benefits to be expected was before the Commission and there is substantial basis for the values the Commission gave thereto (R. 400–407, 423–428; see Appendix A). Nevertheless, in spite of the tenuous basis for the value of existing recreational fishery benefits claimed by Petitioners (R. 3388–89, 3449–51), such values were used in the study of fishery economics (see Appendix A) and were accepted by the Commission (R. 550).

Arguments to the effect that the Cowlitz River contributes at least 10 percent of the $20,000,000 gross value claimed for the Columbia River fishery and that its defense against construction of power dams is essential to prevent the destruction of all fisheries in the Pacific Northwest (Pet. Br. 89–90) do not stand up under proper analysis. Each situation must be considered on its own merits. The Cowlitz Project would utilize the lowest site on the river and is the best power site in western Washington. Assuming the most pessimistic outcome possible, namely, that all of the fishery resources above Mayfield dam would be destroyed, in such an extreme case only about half of the Cowlitz River fishery would be lost (see Appendix A) and the economics would be decidedly in favor of construction of the Cowlitz

Project (see Appendix B). Certainly some of the fishery resources above Mayfield dam would be saved by means of hatcheries (see Appendix A). In addition, the City would provide and assume the annual cost of a multi-million-dollar fish-passing facility which would be a full-scale fishery laboratory. There is no evidence to show that the fish-passing facility would not work. Petitioners rely entirely upon unsupported opinions and judgments (Pet. Br. 90).

The Commission's findings and conclusions relating to the conservation of fishery resources are adequately supported

Petitioners contend that there is no substantial evidence to support the several findings and conclusions in the Opinion and Order of November 28, 1951, relating to the fishery resources of the Cowlitz River and the methods proposed for their conservation (Pet. Br. 24–26, 31, 90–105). Contrary to this contention, there is an abundance of substantial evidence in support of the Commission's action issuing the license. The Presiding Examiner and the Commission had the benefit of a detailed analysis of the record relating to the facilities proposed by the City to conserve the fishery resources of the Cowlitz River (R. 116) and substantially the same analysis is presented here as Appendix C. Even if all of the runs of anadromous fish, constituting about 50 percent of the Cowlitz fishery, were blocked from using the Cowlitz River above Mayfield dam, a sizeable proportion of each run could be maintained by a hatchery program (R. 2948–49, 3571, 3639; Ex. 25, pp. 11–12).

A. The proposed facilities for passing anadromous fish upstream past Mayfield and Mossyrock dams

The City would provide two means of passing anadromous fish upstream past the Mayfield and Mossyrock dams, namely, fish ladders and trapping and hauling facilities (see Appendix C). The ladder facilities at Bonneville dam pass anadromous fish successfully over a height of 67 feet (R. 3707–09). There are indications that the 88-foot ladders at McNary dam on Columbia River will even be better (R. 3707, 3709–13, 3723–25, 3746–47; Ex. 58, pp. 26–28). Fish ladders having heights of 185 feet and 325 feet as proposed by the City have never been constructed (Ex. 30, p. 3) and consequently there is no actual experience on which to base conclusions as to the success to be expected in their operation. No one knows to what height salmonoids will pass via ladders and any opinions thereon are purely conjectural. It is a commonly known physical fact that, insofar as energy is required for lift alone, a salmon in lifting itself a height of 185 feet expends the same amount of energy regardless of whether it does it by following the natural course of a river or by going up a fish ladder. However, additional energy is expended in moving against flowing water between two points, whether it be in a fish ladder and then a relatively still reservoir or in the natural river which has canyons and water flowing at high velocities (R. 961–963, 965, 971–972, 974, 3809). There is nothing to show that the fish which would ascend the ladders would expend substantially more energy than do the

fish which now migrate the same vertical distance in the natural river channel.

The anadromous fish that would use the proposed fish ladders at Mayfield and Mossyrock dams are, under natural conditions, at various stages of sexual maturity when they reach the spawning grounds. The spring chinooks are not near sexual maturity (R. 2950–51, 2955–56). The fall chinooks develop sexually on the migratory run and by the time they reach their bed they are normally about ready to spawn (R. 2956–59). The early run of silver salmon has some lay-over before spawning in the upper river (R. 2960–61, 3795; Ex. 25, p. 4) but the late run spawns shortly after it reaches its beds (R. 2960). The winter run steelhead is sexually mature and ready to spawn while the spring run and summer run steelhead are not near full sexual development (R. 3568). The sea-run cutthroat trout make several migrations and their sexual maturity for spawning is not critical (R. 3570). Thus the spring chinooks would be strong at the time they would reach the ladders at Mayfield and Mossyrock (Ex. 28, p. 14). The fall chinooks which spawn above the confluence of the Cispus with the Cowlitz would be fairly strong by the time they reach these ladders (Ex. 28, p. 12) but those spawning in the Mayfield and Mossyrock reservoirs and in Tilton River would be in an advanced stage of sexual maturity. The silver salmon spawning in the Cispus River would be fairly strong when they reached the ladders (Ex. 28, p. 10), while those spawning in Tilton River would be about ready to spawn but they would have to climb only the

Mayfield ladder. The steelhead and cutthroat trout eat while migrating and do not die after spawning (R. 3566–70); so they would have enough energy to climb the ladders. In view of the foregoing, the record does not support a rejection of the ladder system, in addition to which these particular ladders would provide an important research facility.

The trapping and hauling method of passing anadromous fish upstream is the best one known to date (R. 3660; Appendix C). Spring chinook and fall chinook would be trapped at Mayfield and released above Mossyrock (Ex. 28, pp. 12–15). Practically all of these chinook salmon spawn above Mossyrock dam. The early and late runs of silver salmon would also be trapped at Mayfield and released above Mossyrock (Ex. 28, pp. 10–11) and this method of passing fish upstream would affect adversely only about 14 percent of the silver salmon. By sample handling of silver salmon it may be possible to separate the Tilton fish from those above Mossyrock.

In both the fish ladder program and the trapping and hauling program a fish-tight rack would be provided. Petitioners' engineering witness testified that the construction of an adequate fish rack is entirely a matter of engineering (R. 3897). Such a fish rack can be built to operate satisfactorily (see Appendix C). Unsatisfactory experience in the past with fish racks resulting from poor design and inexperience in operation (R. 398–399; Ex. 35, p. 3; Appendix C) is no indication that a siutable fish rack cannot be constructed and placed in service. There is no evidence

to show that salmon migrate upstream at time of flood stage up to 40,000 cfs (R. 3696–97), but even under such conditions fish racks can be designed to stay in place. The Petitioners have refused to assist the City of Tacoma in the design of a fish rack (see Appendix E).

B. The proposed facilities for passing anadromous fish downstream past Mayfield and Mossyrock dams

The City proposes a new and untried system for gathering salmonoid and other anadromous fingerlings, adult steelhead and cutthroat trout, and lowering them down through Mossyrock dam and over Mayfield dam (R. 214–218; see Appendix C). While it cannot be stated as a fact that such facilities will not work, nor can it be said that they will work (R. 3661–62; Ex. 8, p. 1), nevertheless the plan certainly has excellent possibilities (R. 2238, 2271, 2273). No one questioned the mechanical features seriously. The component parts of the facilities for the lowering system have been analyzed and studied (R. 2237, 2401, 3763; see Appendix C), and improvements would naturally follow from the further tests, studies and experiments required by the license.

Petitioners' fishery experts gave testimony which shows that the effectiveness of the entrance ports in the upstream face of the Mossyrock dam to the upper collection system could be improved if they were enlarged so as to carry more water and if their location were to be moved to the ends of the dam (R. 3370, 3671–74, 3713, 4025–26). They also pointed out that the velocity of the water entering the ports

should be sufficient so that fingerlings could respond to the velocity while at some distance from the ports (R. 1570–71, 3125, 3662). The design of the system provides for control of flows over a wide range of velocities at the entrance to the ports (R. 4232, 4236–37, 4253).

The experts also made helpful suggestions with respect to the collection chamber (R. 1590, 3675–76) and with respect to the proposed screens at the bottom of the chamber (R. 1593–96, 3453–54, 3662–63, 3685, 3726, 4021). Attention was also given to improving the operating cycle and other features of the downstream passage system (R. 839, 849, 1529, 1538–41, 1697). Considerable knowledge has already been gained on the behavior of salmonoids under medium and high pressures of water (R. 1801–02, 3357–58, 3683, 4016–17, 4021–25), and this biological part of the problem does not raise any doubts; the fish can stand the pressures involved.

The design of the system would permit the operating cycle to be modified after construction to obtain best results (R. 1755, 1762–63). Petitioners' fishery experts have no basis for saying that the facilities proposed to pass migrants downstream will not work biologically (R. 2237–38, 2771, 3676). They urge that the method be tried at some existing dam. Unfortunately, such a trial at an existing dam is not practical for many reasons (R. 4257–60).

The problem of passing anadromous fingerlings and adults downstream by high dams must be solved if the anadromous fishery resource of the Pacific Northwest is to be saved (R. 2271–72, 3676). The fishery

experts have had since at least 1934 (R. 3632) to come up with an answer, but until the City came forward with its proposed plan none of the experts had presented a practical plan. The City offers to invest millions of dollars now to provide means of solving the problem (R. 4307, 4310–11, 4313). The City could not as a matter of good business assume such an expenditure if the proposed Cowlitz Project were not so attractive economically as a power development (see Appendix B). The Petitioners have not shown that they will ever have enough money to carry out, on their own, the required studies and experiments to perfect downstream-passing fishery facilities at high dams.

C. Other protective measures proposed for conservation of the fishery resources

A detailed account of the protective measures proposed by the City is set forth in Appendix C. The City proposes to ladder natural obstructions and falls and to conduct the operations of the power plants in such manner as to meet fishery needs (R. 4265–68). The City also proposes to screen the penstocks and to provide trash racks in front of the penstock screens (R. 854, 1577). The screen model tests conducted by the City and by Petitioners do not show what debris problem will be encountered on the Cowlitz. None of the Petitioners' experts has had any experience with screens over specially designed penstock openings at depths of 200 feet, shielded by trash racks, and their opinions have no substantial support. The maintenance of clean screens in deep water is an engineering problem and not a biological

one, and it would not be difficult (R. 1599). A large reservoir such as the Mossyrock would settle out the silt. Dams in service on other rivers have improved the downstream anadromous fishery. Although the existence of the proposed dams would block free movement of fingerlings, not one of Petitioners' witnesses knew how far fingerlings migrated for food (R. 2233, 2265), and any conclusions based on this factor are useless. The record shows that the experience with hatcheries has been quite good (R. 3461, 3927–36, 3958), and the City could contribute much toward conservation of the fishery resource by utilizing modern hatchery facilities. Obviously, if fish hatcheries were not successful, they would not be in such wide use in the western streams.

III

Petitioners have been and will be consulted on fisheries protection measures

As a final objection to the Commission's order issuing a license for the Cowlitz Project, Petitioners contend that the order is an unlawful extension of authority because it does not provide for the determination or adequate testing of the effectiveness of the fish protective devices; it provides for the management of State fishery resources by the City of Tacoma; and it purports to provide for further essential proceedings without opportunity for Petitioners to be heard (Pet. Br. 105–109).

If, as appears from the record, the Cowlitz Project is subject to the licensing provisions of the Federal Power Act, the Commission—not the Petitioners—

is charged with the responsibility for determining how these water resources may best be utilized in the public interest. As the Supreme Court said in the *Roanoke Rapids* case decided March 16, 1953 (73 S. Ct. at 619):

> Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason.

As a matter of fact, it is obvious from their petition and brief that Petitioners' real complaint is not that they have not been consulted and will not be consulted in the future, both by the City of Tacoma and the Commission, but that the Commission has not followed their advice.

If, contrary to the findings of the Commission, the facts before the Court should convince it that the proposed project could not be constructed without complete destruction of the fish runs, although no such conclusion is justified, then the Commission has not exercised good judgment. But, as the Eighth Circuit said in *State of Iowa* v. *Power Comm'n,* 178 F. 2d at 428, "the power of a court or an administrative agency to decide questions is not confined to deciding them correctly."

Moreover, in the instant case the Commission has taken every reasonable precaution to see that the fishery resources are protected to the fullest extent possible, even requiring substantial expenditures for that purpose. As State officers concerned primarily

with fish and wildlife conservation, the Petitioners have been consulted by the Commission as well as by its licensee, the City of Tacoma. Indeed, since the order of November 28, 1951, the City has endeavored to carry on the research required by the Commission and has requested the Secretary of the Interior, the United States Fish and Wildlife Service, and the Petitioners, as the official agents of the State of Washington, to cooperate in essential research on these problems. We attach in Appendix E recent correspondence showing the lack of progress in further research on the fishery protection problems because the Secretary of the Interior and the State agencies refuse to cooperate with the City.

Finally, Petitioners' complaint that the Commission's order provides for approval of final plans for fish facilities without giving them an opportunity to be heard is without merit. Article 30 of the license (R. 559) specifically requires the City to consult with Petitioners in preparing final plans and Petitioners have every opportunity under this cooperative procedure to advise and consult with the Commission in event of disagreement as to the probable effectiveness of the proposed fish facilities.

CONCLUSION

The order of the Commission here under review was issued under the authority of the Federal Power Act in conformity with the standards prescribed by Congress, and was based upon substantial evidence

of record. For the reasons set forth herein, the order of the Commission should be affirmed.

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APPENDIX

Appendices A, B, and C are analyses of the evidence of record relating to the fishery conservation program and the economics of the Cowlitz Project. Substantially the same analyses on these subjects were included in briefs of Commission Staff Counsel in the proceeding before the Presiding Examiner and the Commission.

APPENDIX A

The Economics of the Fishery Resources in Relation to the Conservation Program Proposed by the City of Tacoma

As part of its Cowlitz Project, the City of Tacoma proposes to provide certain fishery facilities and improvements in an effort to offset certain claimed adverse effects of the Mayfield and Mossyrock dams on the fishery resources of the Cowlitz watershed (R. 1291, 1396, 1444–47, 1457–58). The costs of such improvements and facilities would be borne by the City and are considered here in relation to the estimated values of the fishery resources in order to set forth the comparative economics of this phase of the project.

In the analysis of the economics set forth herein there have been utilized the estimates of quantities, unit prices, values, and other data presented through the Petitioners' witnesses unless otherwise indicated. Assumptions and estimates were made only to the extent necessary to complete the analysis.

THE GROSS VALUE OF THE FISHERY RESOURCES OF THE COWLITZ RIVER

Testimony and exhibits were presented on the gross value of part of the fishery resources of the Cowlitz River. This gross value is presented in terms of the commercial catch and the catch by sportsmen (Ex. 25, pp. 7, 8; Ex. 28, pp. 6, 7). The procedure is to assign to the commercial catch a unit price per pound for each type of fish and to compute the total dollar value by summation, and to the sports catch a total dollar value is assigned to each type of fish evaluated and a sum is obtained (Ex. 25, pp. 7, 8; Ex. 28, pp. 6, 7). The totals for commercial catch and for the sportsmen's catch are added to give the gross value of the fishery resources of the Cowlitz River.

The Amount of Commercial and Sports Fish Catch Attributed to the Cowlitz River.—The commercial catch portion of

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salmon and anadromous trout produced by the Cowlitz River watershed is taken in the Columbia River and in the Pacific Ocean (R. 3960–62; Exs. 25, 28). As fish from the Cowlitz are not distinguishable from like fish produced in other rivers, it is not possible to state precisely just how many are produced by the Cowlitz River watershed. Therefore, it was necessary for Petitioners to make a judgment estimate for the approximations of the number of fish of each type produced there (R. 3258–61, 3693–94, 3959–61; Ex. 25).

It was estimated by Petitioners that the Cowlitz River watershed above the Mayfield Dam site produces 249,933 salmon and anadromous trout annually (Ex. 28, p. 6, Table I). Of this number, 85,261 are spawning fish. Thus the difference of 164,672 represents cropped fish weighing 1,825,048 pounds (Ex. 28, p. 6, Table II). By applying the same commercial catch and sports catch ratios to the spawning escapement (Ex. 25), the whole Cowlitz River watershed is estimated to produce about 390,000 salmon and anadromous trout of which about 129,000 are spawning fish. The remainder of 261,000 represents cropped fish weighing approximately 3,070,000 pounds. The difference between 3,070,000 and 1,825,048, namely, 1,244,952, represents weight of the salmon and anadromous fish produced below Mayfield.

In addition, the Cowlitz River below Mayfield produces all of the smelt of the Cowlitz watershed, averaging about 1,500,000 pounds per year (R. 3809).

Thus the Cowlitz River below Mayfield produces about 2,745,000 pounds of fish compared to 1,825,048 pounds of fish produced above Mayfield, on an annual basis.

The increased spawning area due to the requirement that the city maintain a minimum flow of 2,000 c. f. s. rather than 1,090 c. f. s. (average minimum flow) has not been determined (R. 3832–33) but such increased spawning area would increase the amount of fish attributable to the Cowlitz River watershed below Mayfield, according to Petitioners (R. 3963).

The Unit Gross Value of Commercial Fish Catch Attributed to the Cowlitz River.—For purposes of estimating the gross commercial value of salmon and anadromous trout attributed to the Cowlitz River watershed, witnesses for Petitioners used

prices per pound of fish which varied with location of catch, its condition, and type of fish (R. 3960–63; Ex. 28, p. 7, Table IV). The unit prices used represent wholesale commercial values computed from the average prices paid by retailers to wholesalers for their products. These are fresh fish prices and are based on those for the season of 1950 (R. 3356–57). The prices used for outside troll catch are for fish caught, landed and dressed, while those for Columbia River fish are as caught before anything is done (R. 3961).

For the outside troll catch the following prices in cents per pound were used:

55 for spring chinook.
47 for fall chinook.
46 for silvers.

For the Columbia River catch the cents-per-pound prices used are:

51 for spring chinook.
43 for fall chinook.
42 for silvers.
35 for steelhead.

These prices are about as high as they have ever been (R. 3555–56; Ex. 28, p. 7, Table IV).

The wholesale value of smelt is about 10 cents per pound and this unit price is applicable to the commercial catch (R. 2972).

The Annual Gross Value of Commercial Fish Catch.—The gross commercial value of salmon and sea-run trout produced by the Cowlitz River above Mayfield, representing wholesale prices paid by retailers to wholesalers for fresh fish, was estimated at $341,196 for the outside troll catch and $421,289 for the Columbia River catch, the total gross value being $762,485 (Ex. 28, p. 7, Table IV).

The gross commercial value of salmon and sea-run trout produced by the whole Cowlitz River is estimated at $554,322 for the outside troll catch and $704,183 for the Columbia River catch, the total value being $1,258,505. These gross values for the whole Cowlitz River are based on the following annual numbers of fish as estimated from the ratios used in Exhibits 25 and 28:

	Species	Number of fish
Spawning escapement:		
	Spring chinook	10,395
	Fall chinook	30,983
	Silvers	32,088
	Steelhead	16,923
	Cutthroat	38,247
Outside troll catch:		
	Spring chinook	13,929
	Fall chinook	50,812
	Silvers	32,088
Columbia River catch:		
	Spring chinook	11,954
	Fall chinook	51,121
	Silvers	36,901
	Steelhead	4,615

By applying the same average weights as used in Exhibit 28, the following annual pounds of salmon and trout were estimated to be produced by the whole Cowlitz River:

	Species	Number of pounds
Outside troll catch:		
	Spring chinook	208,935
	Fall chinook	762,180
	Silvers	176,484
Columbia River catch:		
	Spring chinook	200,827
	Fall chinook	1,073,541
	Silvers	295,208
	Steelhead	46,150

By using the same average prices per pound as given in Exhibit 28 (p. 7, Table IV), the total amount of $1,258,505 was obtained as an estimate of the gross value of salmon and trout for the Cowlitz River watershed.

The gross value of salmon and trout produced by Cowlitz River below Mayfield is $496,020 as obtained by subtracting the gross value above Mayfield ($762,485) from the gross value for the whole Cowlitz River ($1,258,505).

The gross average value of smelt, which is produced only below Mayfield, is estimated at $150,000 based on an average annual commercial catch of 1,500,000 pounds and a unit value of 10 cents per pound.

The estimated annual gross value of anadromous fish produced commercially on the Cowlitz River below Mayfield is equal to the sum of $496,020 and $150,000, which is $646,020,

and for the section of river above Mayfield the estimate is $762,485, as previously set forth herein.

The Annual Gross Value of Sportsmen's Fish Catch.—The estimated gross value of the sportsmen's catch presented in Exhibit 28 (p. 7, Table IV) for fish produced in the Cowlitz River above Mayfield is $433,146. This is the sum of $42,769 for 18,144 pounds of spring chinook, $59,670 for 74,592 pounds of fall chinook, $18,480 for 11,200 pounds of silvers, $229,356 for 80,000 pounds of steelhead, and $82,872 for 18,645 pounds of cutthroat trout (Ex. 28, pp. 6, 7). From these figures it is readily computed that $2.36 per pound was used by Petitioners to evaluate the sportsmen's catch of spring chinook, $0.80 for fall chinook, $1.65 for silvers, $2.87 for steelhead, and $4.44 for cutthroat trout.

The unit prices for fish as used for sports catch represent the average cost to sportsmen of catching the fish and getting the recreation that goes with the catching of fish (R. 3387–88). The gross value of fish to sportsmen, exclusive of the recreational value, may be reasonably approximated by applying the commercial Columbia River catch unit prices (Ex. 28, p. 7, Table IV) plus 5 cents a pound to account for value beyond the wholesaler so as to approximate retail prices to sportsmen if purchases were made at a market. On this basis, the sports catch would have the following values:

Species	Pounds	Rate per pound	Amount
		Cents	
Spring chinook	18,144	56	$10,160
Fall chinook	74,592	48	35,804
Silvers	11,200	47	5,264
Steelhead	80,000	40	32,000
Cutthroat	18,645	40	7,458
Total			90,686

By summation, the gross fish value (exclusive of recreational value) of the sportsmen's catch of salmon and anadromous trout produced in the Cowlitz River above Mayfield becomes $90,686. As the gross value for the sports catch of salmon and trout and for recreation attributable to those fish in the Cowlitz River above Mayfield is $433,146 per year, then the

recreational value alone attributable to those fish is $342,460 ($433,146 less $90,686).

If the Mayfield and Mossyrock dams are built, the reservoirs created thereby will afford recreational opportunities which will have considerable annual recreational value. Based on experience at other reservoirs in the West and in the Northwestern Region, it is reasonable to expect that annual recreational values attributable to the created reservoirs will offset to a great extent, and may even exceed, the $342,460 recreational value attributable to sports fishing for fish produced above Mayfield.

Based on data presented in Exhibit 25, an estimate was made of the sportsmen's catch in numbers and pounds for the whole Cowlitz River watershed as follows:

Species	Number	Pounds
Spring chinook	1,440	24,192
Fall chinook	5,272	110,712
Silvers	2,216	17,728
Steelhead	12,308	123,080
Cutthroat	38,247	28,685

By multiplying the annual poundage of sports fish by the average unit prices for both fish and recreation used in Exhibit 28 (p. 7, Table IV), the following gross values attributable to the whole Cowlitz River for salmon and trout for both fish and recreation were computed:

Spring chinook	$57,020
Fall chinook	88,570
Silvers	33,029
Steelhead	353,240
Cutthroat	127,648
Total	$659,507

Next, the gross fish value of salmon and trout (exclusive of recreational value) was computed to be:

Spring chinook (24,192 pounds at 56 cents)	$13,547
Fall chinook (110,712 pounds at 48 cents)	53,141
Silvers (17,728 pounds at 47 cents)	8,332
Steelhead (123,080 pounds at 40 cents)	49,232
Cutthroat (28,685 pounds at 40 cents)	11,474
Total	$135,726

The total gross fish value for salmon and sea-run trout sports catch (exclusive of recreational value) produced by the entire Cowlitz River is thus estimated to be $135,726. Therefore the recreational value attributed to salmon and trout sports catch on the whole Cowlitz River is estimated to be $523,781 ($659,507 less $135,726).

The total gross fish value (exclusive of recreational value) of salmon and sea-run trout of the sports catch attributable to the Cowlitz River below Mayfield is estimated at $45,040 ($135,726 less $90,686). The recreational value of the salmon and sea-run trout sports catch produced on the Cowlitz River watershed below Mayfield is estimated to be $181,321 ($523,781 less $342,460).

In addition there is an extensive sports fishery for smelt on the Cowlitz River below Mayfield. In one day as many as a thousand people caught about their limit of 20 pounds and when the smelt are in the river in good numbers virtually everybody gets his limit. The runs of smelt extend from November to March (R. 2972–73, 3809–10; Ex. 59, p. 162). On the basis of this evidence it is estimated that there is an average sports catch of 10,000 pounds per day over a two-month period, totaling 600,000 pounds of sports smelt catch per season. Using a gross fish value of 10 cents per pound, the fish value of the sports catch of smelt is estimated at $60,000. Using a recreational value of 20 cents a pound of smelt, the recreational value of sports smelt fishing would be $120,000.

The total gross fish value (exclusive of recreational value) of the salmon, sea-run trout and smelt of the sports catch attributable to the Cowlitz River below Mayfield is estimated at $105,040 ($45,040 plus $60,000). The recreational value of the salmon, sea-run trout and smelt catch of the Cowlitz River below Mayfield is estimated at $301,321 ($181,321 plus $120,000).

The Annual Gross Value of Total Fish Catch Attributable to the Cowlitz River.—The gross value of the total fish catch attributable to the Cowlitz River watershed is equal to the sum of (1) the gross value of the commercial catch of salmon, sea-run trout and smelt; (2) the gross fish value (exclusive of recreational value) of the sportsmen's catch of salmon, sea-

run trout and smelt; and (3) the recreational value of the sportsmen's catch of salmon, sea-run trout and smelt.

The gross value of the total fish catch attributable to the Cowlitz River above Mayfield is estimated at $1,024,401 [$762,485 (gross commercial value) plus $90,686 (gross fish value of sports catch) plus one-half of $342,460 (recreational value of sports catch) or $171,230]. Similarly, the gross value of the total fish catch attributable to the Cowlitz River below Mayfield is estimated at $1,052,381 [$646,020 (gross commercial value) plus $105,040 (gross fish value of sports catch) plus $301,321 (recreational value of sports catch)]. In the estimates for the Cowlitz above Mayfield it is assumed that only one-half of the fishery recreational value would be offset by the reservoir recreational value, even though it is expected that the offset would be equal to or in excess of the $342,460 estimated as the recreational value of the sports catch above Mayfield. The gross value of the total fish catch for the Cowlitz River, including recreational value of sports catch, is estimated at $2,076,782. Of course, these figures do not include the value of Cowlitz River smelt caught in the Columbia River (R. 2973–74) or the value of fish to be produced by increased spawning areas due to increased flows below Mayfield nor do they include any reductions for spawning areas drowned out by reservoirs.

Conclusion.—On the Cowlitz River watershed, the total gross value due to fish attributable to the area above Mayfield is equal to that below Mayfield, in each case being slightly in excess of $1,000,000.

THE NET VALUE OF THE FISHERY RESOURCES OF THE COWLITZ RIVER

The net value of the fishery resources of the Cowlitz River watershed is equal to the sum of (1) the net value of the commercial catch, (2) the net fish value of the sportsmen's catch, and (3) the recreational value of the sportsmen's catch. For our purposes, the Petitioners' estimates of net value as presented in Exhibit 28 have been utilized although it might be argued that the estimates represent more than actual net value. Such values are presented here for the whole Cowlitz

River basin and for the portions thereof above and below Mayfield. As was done in the preceding part on gross values, estimates were made using the procedures and methods set forth in Exhibits 25 and 28.

The Annual Net Value of the Commercial Catch.—The annual net value of the commercial catch of salmon and sea-run trout above Mayfield is estimated to be $464,346, being made up of $252,449 for outside troll catch and $211,897 for Columbia River catch (Ex. 28, p. 7, Table III).

The annual net value of the commercial catch of salmon and sea-run trout for the whole Cowlitz River watershed, using poundage figures developed in the preceding part hereof, is computed as follows:

Species	Pounds	Rate per pound	Amount
Outside troll catch:		*Cents*	
Spring chinook	208,935	41	$85,663
Fall chinook	762,180	35	266,763
Silvers	176,484	33	58,240
Columbia River catch:			
Spring chinook	200,827	25	50,207
Fall chinook	1,073,541	21	225,444
Silvers	295,208	23	67,898
Steelhead	46,150	18	8,307
Total			762,522

The annual net value of the commercial catch of salmon and sea-run trout attributable to the Cowlitz River below Mayfield is estimated at $298,176 ($762,522 less $464,346). In addition, the average annual net commercial value of smelt produced below Mayfield is estimated at $90,000 (1,500,000 pounds at 6 cents per pound). Thus, the annual net value of the commercial catch of salmon, sea-run trout and smelt attributable to the Cowlitz River below Mayfield is estimated at $388,176 ($298,176 plus $90,000).

The Annual Net Value of the Sportsmen's Catch.—The annual net value of the sportsmen's catch of salmon and sea-run trout produced by the Cowlitz River above Mayfield has been estimated at $202,581 (Ex. 28, p. 7, Table III). This value is based on a unit price figure of $1.00 per pound applied to the sportsmen's catch (Ex. 28, p. 6, Table II).

This total of $202,581 is too high because it includes an amount for fall chinook of $74,592 as net value, while the gross value, based on Petitioners' evidence, is only estimated at $59,-670 (Ex. 28, p. 7, Tables III, IV). However, in the estimates presented here no correction is made.

This annual value of $202,581 represents a fish value and a recreational value (R. 3388). The net fish value (exclusive of recreational value) of the sportsmen's catch of salmon and sea-run trout produced above Mayfield, when estimated at the same price as Columbia River catch plus 5 cents for retailers' differential, is computed to be:

Spring chinook (18,144 pounds at 30 cents)	$5,443
Fall chinook (74,592 pounds at 26 cents)	19,394
Silvers (11,200 pounds at 28 cents)	3,136
Steelhead (80,000 pounds at 23 cents)	18,400
Cutthroat (18,645 pounds at 23 cents)	4,288
Total	50,661

The net recreational value of the sports catch produced above Mayfield is computed to be $151,920 ($202,581 less $50,661).

The annual net value (fish value plus recreational value) of the sportsmen's catch of salmon and sea-run trout produced by the whole Cowlitz River watershed, based on one dollar per pound, is estimated at:

Spring chinook	$24,192
Fall chinook	110,712
Silvers	17,728
Steelhead	123,080
Cutthroat	28,685
Total	304,397

The annual net fish value (exclusive of recreational value) of the sportsmen's catch produced by the whole Cowlitz River when estimated at the Columbia River catch unit prices, plus 5 cents for retailers' differential, is estimated at:

Spring chinook (24,192 pounds at 30 cents)	$7,258
Fall chinook (110,712 pounds at 26 cents)	28,785
Silvers (17,728 pounds at 28 cents)	4,964
Steelhead (123,080 pounds at 23 cents)	28,308
Cutthroat (28,685 pounds at 23 cents)	6,598
Total	75,913

The annual net recreational value of the sports catch produced by the whole Cowlitz River is then computed to be $228,484 ($304,397 less $75,913).

The annual net fish value (exclusive of recreational value) of the sportsmen's catch of salmon and sea-run trout attributable to the Cowlitz River below Mayfield is estimated to be $25,252 ($75,913 less $50,661). The annual net recreational value of the sportsmen's catch of salmon and sea-run trout attributable to the Cowlitz River watershed below Mayfield is estimated at $76,564 ($228,484 less $151,920). The annual net fish value (exclusive of recreational value) of the catch by sportsmen of smelt produced by the Cowlitz River below Mayfield is estimated at $30,000 (600,000 pounds at 5 cents) and the annual net recreational value is estimated at $60,000 (600,000 pounds at 10 cents per pound). The annual net fish value (exclusive of recreational value) of the sportsmen's catch of salmon, sea-run trout, and smelt produced on the Cowlitz River watershed below Mayfield is estimated at $55,252 ($25,252 plus $30,000). The annual net recreational value of the sportsmen's catch of salmon, sea-run trout, and smelt produced below Mayfield is estimated at $136,564 ($76,564 plus $60,000).

The Net Value of Fish Catch Attributable to the Cowlitz River.—The net value of the fish catch attributable to the portion of the Cowlitz River watershed above Mayfield is estimated by components as follows: commercial catch of salmon and sea-run trout, $464,346; sportsmen's catch of salmon and sea-run trout—fish value, $50,661; and sportsmen's catch of salmon and sea-run trout—recreational value, $75,960 (one-half of $151,920); the total being $590,967. Although for purposes of these computations one-half of the recreational fish value is offset by the recreational value of the Mayfield and Mossyrock reservoirs, it is expected that the annual net value of the reservoirs will equal or exceed the $151,920 estimated as the recreational value attributed to salmon and trout sports catch above Mayfield. Exclusive of recreational value, the net fish value is estimate to be $515,007.

The net value of the fish catch attributable to the portion of the Cowlitz River watershed below Mayfield is estimated by components as follows: commercial catch of salmon, sea-run

trout and smelt, $388,176; sportsmen's catch of salmon, sea-run trout and smelt—fish value, $55,252; and sportsmen's catch of salmon, sea-run trout and smelt—recreational value, $136,564; the total being $579,992. Exclusive of recreational value, the net fish value is estimated at $443,428.

The net value of fish catch attributable to the whole Cowlitz River watershed is estimated at $1,170,959 ($590,967 plus $579,992). This figure includes no allowance for Cowlitz River smelt caught in the Columbia River and no allowance for additional fish production because of increased minimum regulated flows, nor does it include adjustments for spawning area covered by the Mayfield and Mossyrock reservoirs.

Conclusion.—The annual net value due to the fish attributable to the area above Mayfield is about equal to that below Mayfield, in each case being slightly less than $600,000. The annual net value due to fish exclusive of recreational value is estimated to be about $515,000 above Mayfield and $445,000 below Mayfield.

THE ESTIMATED COST OF THE FISHERY RESOURCE CONSERVATION PROGRAM

The City has proposed to provide certain fish passing facilities at Mayfield and Mossyrock dams, fish hatchery facilities and stream improvements to assist in conserving the fishery resources of the Cowlitz River should the Mayfield and Mossyrock developments be constructed. In connection with such fishery facilities and stream improvements, there would be required the incurring of investment costs and operation and maintenance costs.

The Investment Cost of Fish Passing Facilities Proposed at the Mayfield and Mossyrock Sites.—The estimated investment cost for fish passing facilities proposed by the City is $7,100,000 (R. 788). Of this total, $3,100,000 represents the cost of fish handling facilities at Mayfield and $4,000,000 at Mossyrock (Item A, Revised Ex. N, p. N–23).

Based on cost estimates included in revised Exhibit N in the application for license (Item A), the estimated investment cost of the fish ladder at Mayfield, including a flume under

the draft tube deck of the powerhouse, is $769,000 ($599,000 direct cost plus 28.4 percent for overhead and contingencies).

At Mossyrock, the estimated capital cost of the fish ladder is $1,290,000 ($1,005,000 direct cost plus 28.4 percent for overhead and contingencies).

Thus, based on estimates by the City, of the total investment cost of $7,100,000 for fish passing facilities, $2,059,000 would be for fish ladders and $5,041,000 for other fish passing facilities.

Although the City also proposed the provision for trapping and hauling of fish (R. 4311, 4313), no estimate of the capital cost of such facilities has been made. For purposes of giving some dollar consideration, an approximate figure of $1,000,000 has been assumed, based on an exhibit in the record (Ex. 25, p. 14). There is some question as to whether fish ladders should be provided for use in upstream migration of salmonoids and sea-run trout in view of the success of fish trapping and hauling procedures now developed (R. 3746). If not required for downstream migration, fish ladders might well be eliminated from the fish passing facility program. However, for purposes of a cost approximation they are retained in the program for this anyalysis.

Thus, the estimated investment cost for all fish passing facilities would be $8,100,000.

The Annual Cost for Operation and Maintenance of Fish Passing Facilities Proposed at Mayfield and Mossyrock Sites.—No estimates have been presented by the City of the annual cost for operation and maintenance of its proposed fish passing facilities (R. 1676–77). For purposes of having some idea of costs, an estimate was made. The annual operating and maintenance costs thus estimated are as follows:

Fish ladders	$15,000
Fish trapping and hauling facilities	60,000
Downstream fish passing facilities	80,000
Total	155,000

The Investment Cost of Fish Hatching Facilities.—The City proposes to construct such fish hatcheries as may be reasonably necessary (R. 4307, 4313). No estimate of the investment cost has been made of fish hatching facilities. For our purposes,

an amount of $1,300,000 was used, based on an exhibit in the record (Ex. 25, p. 15).

The Annual Operating Cost of Hatchery Facilities.—No estimate was made of the annual cost for operating and maintaining the hatchery facilities which may be constructed as part of the Cowlitz River fish resource conservation program (R. 1690). To have a figure for this element of cost, an amount of $170,000 based on an exhibit in the record, has been used (R. 1447; Ex. 25, pp. 14, 15).

The Investment and Annual Operating Costs of Fish Laddering at Natural Falls and Obstructions.—The City stated that it would provide ladder facilities at natural falls and other obstructions as part of its comprehensive fishery plan (R. 4313, 4323, 4384), but no cost estimates therefor have been made. An investment cost of $60,000, based on an exhibit in the record, has been used for this item (Ex. 31, p. 16) to cover 6 ladders. It is expected that annual operating costs would be very small and $1,000 has been used therefor.

The Investment Costs for Stream Improvement for Removal of Obstructions and Pool Pockets.—The City's comprehensive fishery plan includes the matter of stream improvements (R. 4313, 4323, 4384). Based on an exhibit in the record, an investment cost for this feature of the plan of $5,000 is being used herein (Ex. 31, p. 16).

Total Investment and Annual Costs of Fishery Resource Conservation Program.—The total of the foregoing costs of the Cowlitz River fishery resource conservation program is summarized here:

Item	Investment cost	Annual cost of operation and maintenance
Ladders	$2,059,000	$15,000
Other facilities	5,041,000	80,000
Trapping and hauling	1,000,000	60,000
Fish passing facilities	8,100,000	155,000
Fish hatchery facilities	1,300,000	170,000
Fish laddering facilities	60,000	1,000
Stream improvement	5,000	0
Total	9,465,000	326,000

If 3 percent is used to cover the cost of interest and depreciation on the investment in the fishery facilities, the annual fixed charges on the total investment would be $284,000. The total annual cost of the fishery resource conservation program would be $610,000 ($326,000 for O. & M. plus and $284,000 fixed charges). Admittedly, until the fishery resource conservation program is set forth in detail, and this has not been done to date, the amount of $610,000 is nothing more than a rough figure subject to change. Nevertheless, it is sufficiently close to the total amount claimed as the net value due to fish produced in the Cowlitz River above Mayfield to make it particularly desirable to pursue further the fishery resource conservation program.

Conclusion.—The investment cost of facilities and improvements for a fishery resource conservation program is estimated at $9,465,000. The annual cost of operating and maintaining such facilities and improvements plus the fixed charges on the investment is estimated at $610,000.

SUMMARY OF VALUES AND COSTS, COWLITZ RIVER FISHERY

The gross fish value plus the gross recreational value due to the fishery resource of the whole Cowlitz River watershed is estimated at about $2,000,000. About one-half ($1,000,000) is attributable to the portion of the watershed above Mayfield and the other half ($1,000,000) to that below Mayfield.

The net fish value (exclusive of recreational value) due to the fishery resource of the whole Cowlitz River watershed is estimated at about $958,435. Of this amount $515,007 is attributable to the portion of the watershed above Mayfield and $443,428 to that below Mayfield.

The net recreational value due to the fishery resource of the whole Cowlitz watershed is estimated at $212,524. Of this total, $75,960 is attributable to the portion above Mayfield and $136,564 to the portion below Mayfield. If the project is constructed, the loss in the recreational value attributable to fish in the natural watershed above Mayfield may be offset entirely by the gain in the recreational value due to the presence of the two reservoirs.

The net fish value plus the net recreation value due to the fishery resource of the whole Cowlitz watershed is estimated at $1,170,959. About one-half ($590,967) is attributable to the portion of the watershed above Mayfield and the other half ($579,992) to that below Mayfield.

The investment cost for facilities and improvements for the suggested Cowlitz River fishery resource conservation program is estimated roughly at $9,465,000. The associated total annual cost of this program is estimated roughly at $610,000.

APPENDIX B

The Economic Feasibility of the Cowlitz Project

The Cowlitz Project would be economically feasible if it is shown to be financially feasible and if the total dollar benfits due to the project exceed the total of the costs of the project plus the losses, if any, resulting from the project.

FINANCIAL FEASIBILITY

The financial feasibility of the Cowlitz Project would be determined by the amount of money that the City could borrow, service and retire in a reasonable time, at a reasonably satisfactory interest cost (R. 1448–49). The investment cost of the project facilities proposed for the Cowlitz Project, except those relating to fish conservation, is estimated at about $135,000,000 (R. 4109–10). This cost may be reduced to about $130,000,000 by use of an arch gravity dam in lieu of the type originally proposed (R. 787–788; Ex. 10, p. 6). As the City could finance a debt of $142,000,000 over a reasonable period of time (Tr. 316, Ex. 12), there may be a margin of as much as $12,000,000 available for investment cost in fishery facilities and improvements. In view of this situation there should not be any difficulty in financing an investment cost of $9,465,000 for fishery facilities and improvements. It follows, therefore, that the financial feasibility of the entire Cowlitz Project is established provided that further studies and detailing of fishery facilities do not substantially increase the estimated investment costs for fishery facilities and improvements.

COMPARISON OF DOLLAR VALUES AND COSTS OF THE COWLITZ PROJECT

The record shows that the annual value of the power output of the Cowlitz Project would exceed the cost of production by $1,700,000 (R. 4114–17).

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If no facilities or improvements whatsoever were made at the Mayfield and Mossyrock developments or elsewhere to conserve the fishery resource of the Cowlitz River watershed above Mayfield, the estimated net value of the loss of fish and recreation associated therewith would be $515,007 for fish plus $75,960 for fishery recreation, making a total of $590,967. On this basis, the annual net benefits of the Cowlitz Project would be $1,109,000 in excess of project costs and fish losses [$1,700,000 (net power value) less $590,967 (net value of fish and recreational loss)] and the project would be economically feasible.

On the basis of a fishery resource conservation program at the estimated cost as herein developed, the economic picture would be somewhat as follows. Annual power benefits in excess of costs are estimated at $1,700,000. The annual cost of a fishery program is estimated at $610,000. Assuming one-half of the fishery resource above Mayfield is saved, the estimated net value of that portion which would be lost would be about $300,000. On this basis the annual net benefits of the Cowlitz Project would be $790,000 in excess of costs and fish losses ($1,700,000 power value, less $610,000 fish facilities operating cost, less $300,000 fish loss). Assuming that no fish above Mayfield are saved by the fishery resource conservation program, the annual net benefits of the Cowlitz Project would be $499,033 ($1,700,000 power value, less $610,000 fish facilities operating cost, less $590,967 fish loss).

CONCLUSION

Based on presently available cost data in the record and on the estimates made to roughly approximate other costs, the Cowlitz Project is indicated to be financially and economically feasible.

APPENDIX C

The Plan Proposed by the City of Tacoma for Conserving the Fishery Resources of the Cowlitz River

HANDLING UPSTREAM MIGRANTS DURING CONSTRUCTION PERIOD

During the period of construction the City of Tacoma proposes to pass the upstream migrants through a diversion tunnel at each of the Mayfield and Mossyrock dams. The diversion tunnels at Mayfield and Mossyrock dams will be 460 feet long and 1510 feet long, respectively (Ex. 11).

During the construction of Mayfield dam the natural stream will be unwatered for a period of only three to four months, i. e. July to October, when the flows are normally low. The tunnel will be designed so that it will be only partially full of water during normal summer flows and velocities will be low enough for passage of upstream migrants (Exs. 11, 63; R. 3734). During the period of filling the Mayfield reservoir the City plans to pump water into the fish ladders to attract fish into them, trap the fish and haul them above the dam (Exs. 11, 14). The record indicates that the problem of handling upstream migratory fish during construction of Mayfield dam can be satisfactorily solved.

During the construction of Mossyrock dam the problem of handling upstream migrants is a more serious one. The diversion tunnel is much longer and the river will be blocked for a period of about 18 months (Ex. 11). The upstream migrants should have no difficulty passing through the velocities in this tunnel during periods of normal flow (Exs. 11, 63; R. 3734–35). However, the particular objection of the Petitioners is the distance to be traveled in darkness without resting pools and the excessive currents during periods of high flow. Witness Barnaby of the Fish and Wilflife Service testified for Petitioners that the velocity in the Mossyrock tunnel should not exceed 3 feet per second (R. 3734–35). Exhibit 63 shows that flows with velocities of less than 3 feet per second will pre-

vail at the edges of the tunnel when as much as 10,000 cubic feet per second is passing through the tunnel. This flow is exceeded only about 7 percent of the time (Ex. 14, p. 37). If further tests show the desirability of lighting the tunnels, there appears to be no engineering reason why this cannot be done.

During periods of flow in excess of 10,000 c. f. s., and during the period of filling the reservoir the City plans to utilize the fish ladders so as to attract the upstream migrants to a point where they can be trapped and hauled above the dam. It cannot be determined from the record to what extent the upstream migrants will use the Mossyrock diversion tunnel. However, the method of trapping and hauling should produce satisfactory results (Ex. 59, pp. 7, 17; Ex. 32, p. 47).

UPSTREAM FISH PASSING FACILITIES FOR USE DURING THE OPERATING PERIOD

The City proposes to construct fish ladders at the Mayfield and Mossyrock dams for passing the upstream migrants from tailwater to headwater. The ladder at Mayfield would be 185 feet in height and the one at Mossyrock 325 feet in height.

The facilities at the Mayfield site contemplate a collecting flume across the front of the powerhouse with an opening to the fishway at each end of the powerhouse, with sufficient velocity discharge for the attraction of fish. A fish barrier will be located immediately above the powerhouse to prevent fish from ascending the stream above the powerhouse and to divert the fish into the collection system of the fishways. The fish ladders will consist of a series of pools each one foot in elevation above the preceding one, and are four or five feet deep, with a weir at the lower end, with one foot of water flowing over the top. The pools are each about 16 feet long. Resting pools are also proposed at various points in the ladders (Ex. 14).

The facilities at Mossyrock dam contemplate a fish barrier located at the upstream end of the powerhouse for the purpose of diverting fish into a fish ladder of similar design as the one at Mayfield. Sufficient velocity discharge will be provided at the entrance to the fishway for attraction of fish. In order for the fish to enter the Mossyrock reservoir at varous pool

elevations (maximum drawdown 100 feet) the City contemplates, as one method, five passageways or tunnels running partially filled through the upper portion of the dam at each 25-foot elevation above elevation 650 so that the maximum distance of passing the upstream migrants down into the reservoir by means of a smooth, watered chute would vary from zero to twenty-five feet (Ex. 19; R. 860–864, 4014–15).

If the ladder method of handling upstream migrants is not considered desirable, the City contemplates other alternate methods such as trapping and hauling, similar to the installation made by the Corps of Engineers at Mud Mountain dam, Washington, or a combination of ladders and hoist (Ex. 14, p. 13). Fish locks, such as are proposed at McNary dam, might also be used (Ex. 58).

The plan of the City proposing the use of fish ladders was strongly opposed by the witnesses for the Petitioners. Therefore, an analysis is presented of the testimony on the various features of the proposed facilities.

The Fish Rack or Barrier.—The fish experts for the Petitioners questioned the adequacy of the fish racks. This testimony was based principally on the experience with racks on other streams, particularly the Balls Ferry rack in Sacramento River below Shasta dam (Exs. 30, 35). The evidence indicates that in most instances the racks were not properly designed to withstand high flows (Ex. 35, p. 3). Witness Fry of Petitioners testified that if the racks are properly constructed the loss of fish will be small (R. 3089–90). Most of the criticism concerning the racks was directed to their use during the period of construction when the river flow is uncontrolled. In this connection Dr. Hubbs, testifying for the City, suggested that the rack should have movable sections to permit fish to pass during construction (R. 1739–40). After the project is in operation the river would be controlled and the racks would be subject to floods or heavy debris only on very rare occasions (Ex. 11). Regulated flows in excess of 10,000 c. f. s. at Mossyrock dam will prevail only about 2 percent of the time, based on the flow period of record (Ex. 10, Plate 10). From an engineering standpoint it is inconceivable that a fish rack could not be adequately designed and constructed to withstand the flows

that will occur at the racks. In any event, the fish racks could be tested by model study (R. 4011–13) and consequently do not offer an insuperable problem.

The Fish Ladders.—The testimony of the fish experts for the Petitioners indicates that the fish ladders at the Mayfield and Mossyrock dams would not prove successful, particularly because of their great height. To date, the highest dam that has been successfully laddered is Bonneville which has a height of 65 feet (Ex. 30). The principal objection of the fish experts for the Petitioners is that the fish arriving at Mayfield and Mossyrock dam sites will be greatly weakened due to their advanced sexual maturity and therefore would not have sufficient stored energy to climb the ladders with resulting failure to spawn and reproduce (R. 2921–22, 2956, 2959). There might also be considerable delay in finding the ladders (R. 2110–11, 3205–06). Witnesses Barnaby and McKernan of Petitioners testified that the salmon would expend more energy in going up the ladders and through the pools than they would by traversing the same stretch of the natural river (R. 2877, 3207–08) but they had no factual basis for their opinions. This testimony was disputed by Dr. Hubbs, fish biologist for the City (R. 1319–21, 1712). The testimony of several witnesses for the Petitioners indicates that it would take a life cycle of four years to determine whether the upstream migrants which successfully negotiated the ladders had failed to spawn and reproduce (R. 2922). They recommend, therefore, that the ladders be tested over several life cycles of the various species of fish on some other stream (Ex. 39, R. 2271). However, the record does not indicate what comparable dams are available for such testing and how such facilities could be installed without damaging such dams nor who would bear the considerable expense involved in such a test.

In his testimony Dr. Hubbs recommended that a combination ladder system and hauling system be adopted for passing upstream migrants over the dams, the hauling system for handling the fall chinooks and the ladder for the spring chinooks (R. 1716) because the probability of the fall chinooks climbing the ladder would be less since they are nearer sexual maturity. However, it was his opinion that the fall chinooks

would also successfully climb the ladder, although he had no detailed evidence, physiological or by observation, in support of his opinion (R. 1781).

Resting Pools.—The testimony of the witnesses for the City and the Petitioners is at variance with regard to the effectiveness of resting pools in the ladders. The Petitioners claim that resting pools should not be included in the ladders because the salmon would come to rest therein and fail to proceed to the top of the ladders (R. 3209–11). The City's witness, Dr. Hubbs, claims that resting pools are desriable to permit the salmon to recuperate its strength in ascending the ladders. He testified that salmon take advantage of resting pools in natural streams (R. 1315–16, 4014). He also testified that additional advice and experimentation is desirable (R. 4014).

The Attraction of Fish into the Ladders.—Witnesses for the Petitioners testified that the delay encountered in finding the entrance to the fish ladders would have a serious effect on the salmon and may result in mortality of the fish before reaching the spawning grounds (R. 2110–15, 3746–47). Dr. Hubbs expects the losses due to delay in finding the ladders would be small (R. 1716). The testimony indicates that more study and experiments are required to (1) determine the number and exact locations of the entrances to the fish ladders and (2) to establish the velocities necessary to attract the fish (R. 1710, 2111, 2873–74, 3206–07, 3709–10). In this connection the city has indicated its willingness to give this matter further study and to provide sufficient entrances at the locations recommended by the fishery interests and the license requires such further study.

Passing Upstream Fish into Mossyrock Reservoir.—A proposed method of passing the upstream migrants into the Mossyrock reservoir at various elevations of drawdown consists of five passageways through the upper portion of the dam at each twenty-five foot elevation above elevation 650 so that the distance through which upstream migrants would pass in moving from the ladders down into the reservoir would vary from zero to a maximum of twenty-five feet (Ex. 19, R. 861, 3657, 4015). The fish would slide down a smooth, watered chute (R. 1322–24, 4015). Petitioners' witness Barnaby testified that passing fish

down into the Mossyrock reservoir in the manner proposed by the City would injure the fish (R. 3658–59). The City's Dr. Hubbs testified that with proper experimentation the chute could be designed to pass the fish safely into the reservoir (R. 4015, 4061–62).

Trapping and Hauling Upstream Migrants.—An alternate method for passing the upstream migrants over the dams consists of trapping and hauling. The method proposed by the City would involve the passing of the upstream migrants into a ladder, their trapping and then having the fish hauled and released at some point above the dams (R. 1716; Ex. 14). The evidence shows that this method has proved to be reasonably satisfactory at the Mud Mountain dam, Washington, a flood-control project constructed by the Corps of Engineers (R. 3746; Ex. 59). The 1948 report of the Washington State Departments of Fisheries and Game in the Cowlitz Project (Ex. 25, p. 11) states that the success of trapping and hauling fish would be reasonably efficient and that no significant damage is expected to result from such an operation. This method of passing upstream migrants over dams is being used at other projects (Ex. 32, p. 47; Ex. 59, p. 19) and is planned by Washington State Department of Fisheries for passing fish over Tumwater Falls in connection with the Deschutes River project, Washington (Ex. 59, pp. 7–9). Petitioners' witness Barnaby testified that in his opinion the best method would be to trap and haul the upstream migrants (R. 3660).

CONCLUSIONS

There are several problems which require both engineering and biological study in connection with the ladder system before adoption of a final design, but the record does not support a rejection of such a system at this time. Furthermore, the record shows that the method of trapping and hauling should produce reasonably satisfactory results.

HANDLING DOWNSTREAM MIGRANTS DURING THE CONSTRUCTION PERIOD

At each of the proposed dams the City plans to construct large diversion tunnels to pass the river flow during the con-

struction period when it is necessary to unwater the river bed or during other phases of construction. The downstream migrants, during this period, will have to pass through these tunnels. During low flows these tunnels should offer no particular hazard since the water velocities would be low and the fingerlings generally go downstream at night (R. 2393–94, 3805). During high flows, especially at the Mossyrock tunnel which will be in operation for about 18 months (Ex. 11, pp. 49, 50), the fingerlings which migrate downstream will probably be subject to a somewhat greater hazard in passing through this tunnel. Streamflow records, however, show that during the spring months of April and May, when the bulk of the fingerlings migrate downstream, the river flows exceeded an average monthly flow of 12,000 c. f. s. only on two occasions during the 39-year period of record from 1908 to 1946 (Item A). A flow of 12,000 c. f. s. would produce a velocity in the Mossyrock tunnel of about 13 feet per second (Ex. 14, p. 37) which should not be detrimental to the fingerlings. Therefore, the record indicates that the problem of handling downstream migrants during the construction period will be adequately solved.

HANDLING DOWNSTREAM MIGRANTS DURING THE OPERATING PERIOD

The downstream migrant fishery facilities proposed for use after construction of the dams consist of means of screening the water before it enters the intakes to the powerhouse and of passing the fingerlings hydraulically from the headwater to tailwater. At Mossyrock the fingerling system consists essentially of fish intakes adjacent to the turbine entrance screens, water passages to direct water containing the fingerlings into the dam and thence into collecting chambers for subsequent depressurizing and releasing into the fish ladders for passage downstream. A similar system is also provided at higher levels in the dam above the turbine intake level, except that no screening of flows will be necessary (Ex. 9).

The collection chamber will contain a fish screen to prevent the fingerlings from passing through the conduit system into the turbines (Ex. 9). This screen was the subject of considerable testimony by the Petitioners' witnesses who claimed

the screen would clog due to debris or would cause injury to the fingerlings (R. 2888–90). The fingerling entrance ports were also the subject of considerable testimony because the Petitioners did not believe the fingerlings would be able to find or use them, especially in the upper levels of the dam away from the turbine intake entrances (R. 2880, 3713). Testimony with respect to the chances for successful operation of these ports was conflicting in that some expert testimony indicates that they would work satisfactorily (R. 1343–44, 3225, 3671–73) while other witnesses assumed that the fingerlings would have to be very close to a port before being attracted (R. 2120, 2881, 3713–14).

At Mayfield there would be no collection chamber or depressurizing of the fingerlings. They are to be screened in front of the turbine intakes and passed directly into a fish ladder for descent into the natural channel below the dam (Ex. 14, pp. 7–11, Plates I and II).

The hydraulic design of the fingerling system at Mossyrock is such that flows through it can be varied over a considerable range to accommodate the various fish habits which may be encountered (R. 883–887, 894–897, 900, 909–912).

Passage of the Larger Fish Through the Downstream System.—The water passages through the downstream fingerling system are sufficiently large to pass the adult steelheads and sea-run cutthroat trout which migrate downstream after spawning (R. 837, 2884–85; 3972–74).

Screening of Intakes to Turbine Entrances.—The entrances to the Mossyrock turbines constitute large areas located at considerable depths in the reservoir. The problems of keeping these screens clear of debris and fish tight might entail some difficulties in design, construction and operation, but this is chiefly an engineering problem capable of solution.

At the Mayfield dam the fish screens will be closer to the surface and their design, construction and operation should prove easier of solution.

The City and the Petitioners conducted screen model tests to determine the rapidity of clogging (Exs. 14, 28). The City found that the water at the intakes of the Alder dam (where its tests were conducted) carried little debris (Ex. 14, p. 18–A;

R. 4209–18) while the Petitioners' test indicated that the water passing through the Baker River power plant carried sufficient debris to require the screens to be cleaned after 3 to 5 days of operation (R. 3869; Ex. 28, pp. 36–38). There is no evidence to indicate specifically what might be expected on the Cowlitz River with respect to debris which might clog fish screens, particularly the ones in front of the turbines at Mossyrock. There is also no evidence which might indicate the economic consequences which would result from frequent cleaning of screens, but it is inconceivable that such maintenance could materially affect the economics of the proposed development.

Predatory Fish.—There was some testimony by Petitioners' witness that predatory fish would congregate in the vicinity of the entrance ports, in the collection chambers and in the fish ladders and feed on the fingerlings (R. 3579–83). This testimony was of a qualitative nature but did not prove that such losses would exceed those which occur in nature due to the predators. Also, since the fingerlings migrate chiefly at night and since the predators feed by sight (R. 1703, 1783–84, 1803–04) there is no reason to expect an unusual loss of fingerlings to predators.

CONCLUSION

The record does not show conclusively whether certain features of the facilities for passing downstream migrants will be adequate to prevent excessive losses, but the record does indicate that with proper testing and experimentation it should be possible to provide fish passage facilities which will prevent undue losses of downstream migrants. Consequently, further tests and experimentation should be made before the permanent features of the fish passing facilities are constructed.

THE FISHERY CONSERVATION PRACTICES, PROJECTS AND FACILITIES PROPOSED BY THE CITY

In connection with its Cowlitz Project, the City proposed certain means to conserve the fishery resource of the Cowlitz River. These are presented under the following topics.

The Laddering of Natural Obstructions and Falls.—The City proposes to provide ladders or other suitable means to pass salmon and sea-run trout over natural obstructions and troublesome falls (R. 1395–96, 1445, 2953; Ex. 10). Petitioners noted that the Lower Columbia River development program includes the same stream-improvement matters (R. 2946–48, 2953) and suggest that nothing new would be added by the City (Ex. 30, p. 7). The Lower Columbia program is listed in Exhibit 31 (p. 16) and to the extent that the City's program would provide further facilities it would be an additional benefit. Obviously, if the City finances any or all of the stream-improvement program, it would be making a definite economic contribution to the Lower Columbia fishery program. This matter merits further study.

The Provision of Fish Hatching Facilities.—The City would provide such fish hatcheries as may reasonably be necessary for purposes of the Cowlitz Project. To the extent that such hatcheries are in excess of those proposed in the Lower Columbia River program as it relates to the Cowlitz River they will be definite improvements. Further, if the City participates in the costs of such fish hatcheries, it will be making a definite contribution to the fishery program, thus making it unnecessary to provide State and Federal funds for that purpose. As no specific program was presented in the record, the license requires that the matter of fish hatcheries be explored further.

The Increase in Spawning Area Above and Below Mayfield.—The increase in spawning area above Mayfield would be attributed to laddering of obstructions now blocking fish migration and the removal of material at other obstructions blocking migration in varying degrees. There is not sufficient evidence in the record to show whether the City's plan will provide spawning area above Mayfield in addition to that contemplated in the Lower Columbia River program. This feature must be given further study.

There will definitely be an increase in spawning area below Mayfield because of increasing the natural minimum flow of 1,092 to a minimum regulated flow of 2,000 c. f. s. (R. 3018; Ex. 28, pp. 16–18), but the amount of such increase has not

been determined (R. 3832–33). However, the gain in spawning area below Mayfield that will result when flows are increased from 1,550 c. f. s. to 2,000 c. f. s. was estimated by Petitioners to be 65,070 square yards after a survey made when actual flows were 1,550 c. f. s. (Ex. 28, p. 16). It might well be, due to river bed contours, that a survey comparing the natural minimum flow of 1,092 c. f. s. with a flow of 1,550 c. f. s. would show a gain of about 120,000 square yards in spawning area in the river bed affected. Thus the total gain in spawning area would probably be in the order of 185,000 square yards as a result of increasing the natural minimum flow of 1,092 c. f. s. to a minimum regulated flow of 2,000 c. f. s. as required by the license.

It has been suggested that the gain in spawning area below Mayfield resulting from increased minimum flow of 2,000 c. f. s. would not be of practical value because of the adverse effects of daily variation in flows due to power operations (R. 3624). As the Cowlitz smelt ran into the Lewis River during 1949 and 1950 below the Ariel hydroelectric plant, which is operated as a peaking plant with resultant fluctuations in flow, the effect of variations in flow on smelt does not appear to be adverse (R. 3809–11). Power operating and load curve studies show that it is not necessary to run the Mayfield plant for peaking and it could be run at constant loads (R. 4198–99). Further it was suggested by reference to Ariel dam that there would be a change in temperatures and chemical content of the water with adverse effects which would more than offset the gains in spawning area (R. 2161–67, 2180–85; Ex. 28, pp. 24–28). Based on the record it is difficult to consider seriously the claimed adverse effect of temperatures and chemical content changes because of the benefits therefrom as experienced on the Sacramento River below Shasta and Keswick developments (R. 3152–53), and on the Skagit River below Gorge, Diablo, and Ross hydroelectric developments (R. 2306). These benefits are attributable to the colder water provided from the reservoirs during the summer and fall months. A like situation would exist if the Mayfield and Mossyrock developments were constructed. It would be well to note that where there are

dams in series on a river, benefits to fish are provided as noted above.

In short, the gain in spawning area below Mayfield would be beneficial and there is nothing in the record to prove that water temperature or chemical conditions in the river below Mayfield dam would be adverse to anadromous fish.

Pollution Abatement below Mayfield.—Some pollution of the harmful type exists on the Lower Cowlitz River (R. 2209–10, 2276–77, 2976–77, 3636, 3788). Although the record does not show whether such pollution is in lethal concentrations, it is to be expected that with growth of industry in the Lower Cowlitz River harmful pollution could be so serious as to require considerable investment in remedial facilities. The increase in minimum flows from 1,092 c. f. s. to 2,000 c. f. s. would be a definite contribution by the Cowlitz Project to pollution abatement.

Spawning Areas in Cowlitz Project Reservoirs.—Data in the record indicate that the Mayfield reservoir would flood out 116,400 square yards of existing spawning area and Mossyrock reservoir, 298,265 square yards, the total being 414,665 square yards. (Ex. 28, p. 18). In the Mayfield reservoir there would be 200 acres with a submerged depth of less than 10 feet (R. 4263). The amount of the area so submerged that might be suitable for spawning is not known but salmon have been observed spawning in depths up to 12 feet (R. 3851).

The area to be inundated by the Mayfield and Mossyrock reservoirs is accountable for 90,571 pounds (933,717 pounds times 9.7 percent) of fall chinook (Ex. 28, pp. 6, 13), corresponding to 6,378 fish. With improved flow conditions and greater spawning area below Mayfield it is expected that much of the loss of fall chinook resulting from flooding of the spawning areas in the reservoir sites would be offset by gains below Mayfield (Ex. 39, p. 11). The extent of offset would be established to greater accuracy after completion of studies of gain in spawning areas below Mayfield which would result from increasing minimum flows from 1,092 c. f. s. to 2,000 c. f. s.

CONCLUSIONS

The City proposes conservation practices, facilities and improvements for conservation of the fishery resources of the Cowlitz River. Such proposals and the effects thereof are not sufficiently detailed to permit an adequate appraisal of their effectiveness. They show enough promise to warrant the carrying through of more detailed studies and plans.

APPENDIX D

Department of the Interior

INFORMATION SERVICE

DEPA—P. R. No. 116.

Defense Electric Power Administration.
For immediate release January 16, 1953.

DEPA TEMPORARILY SUSPENDS BAN ON INTERRUPTIBLE ELECTRIC POWER IN PACIFIC NORTHWEST AREA

James F. Davenport, Administrator of Defense Electric Power Administration today signed an order temporarily suspending the ban on the use of interruptible electric power in the Pacific Northwest area.

The order suspends Direction 1 to DEPA Order EO–4A, and follows closely upon one signed by him on January 13, 1953, restoring the ten percent curtailment of firm power in the same region. Both steps were taken as a result of improved water conditions caused by heavy rains and on the recommendation of the Northwest Advisory Committee.

Owing to crucial drought conditions in the Pacific Northwest which began last September, the sale or use of interruptible electric power was banned by DEPA on November 1, 1952. Recent rains have now restored normal water flow and replenished the various reservoirs and storage areas, making the ban on interruptible no longer completely necessary.

DEPA states that it is not expected that its suspension of the ban on interruptible power deliveries will be followed by full resumption of such deliveries, but that DEPA's action will permit service to interruptible customers from time to time as power is available.

Administrator Davenport's message to the principal electric utilities affected by the suspension of the ban on interruptible was also sent to the Northwest Advisory Committee and other

cooperating groups in the shortage area which consists of the States of Washington, Oregon, and a portion of Idaho. The Governors of these States were also notified of the lifting of the ban. Administrator Davenport's wire reads as follows:

> DEPA Advisory Committee advises that water conditions now considered sufficient to service firm load to end of storage season. Directon one to Order EO–4A is temporarily suspended. Effective immediately.

DEPARTMENT OF THE INTERIOR

INFORMATION SERVICE

DEPA P. R. No. 115.

Defense Electric Power Administration
For release January 13, 1953

DEPA RESTORES 10 PERCENT CUT IN FIRM POWER IN PACIFIC NORTHWEST AREA

Administrator James F. Davenport of the Defense Electric Power Administration announced today that because of heavy rains and improved water conditions, Defense Electric Power, on recommendation of the Northwest Advisory Committee, has lifted its restrictions which impose a general ten percent curtailment of firm power in the Pacific Northwest Region.

The quota restrictions on the use of firm power in the region, which have been in effect since November 17, 1952, under the terms of Direction 2 to Order EO–4A, on all users of firm power in excess of 8,000 kwh. weekly, have now been removed as well as the need for voluntary curtailment by smaller users.

DEPA states, however, that previous restrictions on the use of interruptible power, which went into effect on November 1, 1952, remain in force. Moreover, it will still be necessary to continue more than normal use of steam generation to make up for the deficiency in water power.

J. Frank Ward, chairman of the Advisory Committee, in a wire to DEPA stating that the advisory group recommends lifting the curtailment, describes the weather and water conditions in the area as being much improved by recent rains and that "firm loads can be carried during rest of drawdown season

without curtailment and with some remaining reserve, assuming full steam operation."

On the basis of these conditions, Ward said, "the operating committee and advisory committee recommend immediate lifting of mandatory and voluntary curtailment required by Directive 2 of EO–4A. We recommend also that Directive 1 referring to interruptible loads and Order EO–5 be retained in effect."

The advisory committee, the interested utilities and the Governors of the States of Washington, Oregon and Idaho were notified today of the lifting of the ten percent cut by DEPA in the following telegram signed by Administrator Davenport:

> Acting on advice of Northwest Power Pool Operating Committee, the DEPA Northwest Advisory Committee has recommended revocation of Direction 2 to DEPA Order EO–4A. DEPA hereby revokes effective immediately Direction 2. Deliveries of interruptible power prohibited. Forms DEPA–31 and 32 not required for week beginning January 12. Utilities will please complete curtailment records to January 12.

APPENDIX E

City of Tacoma

DEPARTMENT OF PUBLIC UTILITIES OPERATING THE MUNICIPAL ELECTRIC LIGHT, POWER, WATER AND BELT LINE RAILWAY SYSTEMS

Tacoma 2, Wash., *April 8, 1952.*

Federal Power Commission,
Washington 25, D. C.

Gentlemen: Under the terms of the license issued to the city of Tacoma for the Cowlitz Power Development we are required to carry on certain research work in connection with the development of fish facilities and the demonstration of their adequacy and to report quarterly on the progress of the work carried on with regard to all phases of the project. A brief report complying with this requirement has been forwarded to Mr. Lesher Wing as of April 2.

The purpose of this letter is to advise the Commission of the steps which the City has taken looking toward establishment of proper cooperative arrangements with the Department of Interior and the Departments of Fisheries and Game of the State of Washington regarding fishery problems. Copies of correspondence involved are attached for your information and the steps taken can be reviewed briefly as follows:

On December 1, Messrs. Dean Barline and J. Frank Ward, met with Secretary of the Interior, Oscar L. Chapman, in Portland, Oregon, and discussed the need for a definite arrangement to undertake cooperative studies. This was followed by a letter from Mr. C. A. Erdahl, Commissioner of the Department of Public Utilities, to Mr. Chapman on December 3, 1951, to which Mr. Chapman replied that the United States Fish and Wildlife Service would zealously cooperate with the City along the lines indicated in the license. Shortly following discussions with Mr. Chapman, telephone calls were made to Mr. John A. Biggs, Director of the Department of Game

of the State of Washington and Mr. Robert J. Schoettler, Director of the Department of Fisheries of the State of Washington, requesting appointments when the officials of the City and the Department of Fisheries and Game might explore the work to be undertaken with regard to fishery problems. These attempts to initiate a cooperative program met with no success, but rather with postponement by the Departments of Fisheries and Game on the stated assumption that the projects were not likely to be built. This matter was called to the attention of Governor Langlie of the State of Washington, and his reply also is attached.

Following this exchange of correspondence and subsequent to the action taken by the City to institute suit in the Superior Court of the State of Washington in Thurston County and by the Departments of Fisheries and Game of the State of Washington in the 9th United States Circuit Court of Appeals, Secretary Chapman advised the City that in view of the litigation, cooperation of the United States Fish and Wildlife Service would be postponed. Mr. Erdahl has again written to Secretary Chapman urging the designation by him of persons on his staff who could initiate the studies in this very necessary program of cooperation.

The City is prepared to engage consultants and set up pilot plant tests and do the engineering design work which is required.

We hope that this program can be gotten under way at an early date, but feel that we have already given evidence of our desire to carry out the requirements of the license with regard to fishery facilities although our efforts have not met with the cooperation we feel we are entitled to receive.

Yours very truly,

J. Frank Ward,
Superintendent, Light Division.

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

WASHINGTON 25, D. C., *February 13, 1952.*

MY DEAR MR. ERDAHL: In my letter of January 5 I wrote that the Fish and Wildlife Service would extend full cooperation toward fulfilling the Federal Power Commission's requirements for the Cowlitz River power development.

Shortly thereafter, I learned that the State of Washington is preparing to take legal action to prevent the construction of the dams covered by the Federal Power Commission license. Under these circumstances, it seems inappropriate for the Fish and Wildlife Service to do anything other than to stand by until the legal issues have been resolved.

Sincerely yours,

(S) OSCAR CHAPMAN,
Secretary of the Interior.

MR. C. A. ERDAHL,
Commissioner of Public Utilities, Department of Public Utilities, City of Tacoma, Tacoma 2, Wash.

THE DEPARTMENT OF GAME

JOHN A. BIGGS, DIRECTOR
509 FAIRVIEW AVENUE NORTH
SEATTLE 9

JANUARY 21, 1952.

Mr. J. FRANK WARD, *Superintendent,*
Light Division,
City of Tacoma, Department of Public Utilities,
Tacoma 2, Wash.

DEAR MR. WARD: I am in receipt of your letter formally requesting initiation of a series of conferences between the Departments of Game and Fisheries and the Department of Public Utilities of the City of Tacoma for the purpose of discussing problems incidental to the passage of fish through the proposed dams on the Cowlitz River. I note that you propose rather a complete agenda covering phases which from your viewpoint, appear to be worthy of discussion.

I share the views of Mr. Schoettler that because of the litigation now pending having to do with the construction of the dams and because I fail to feel that there is any immediate assurance that the dams will be constructed, I do not believe it desirable to divert the time of our technicians, badly needed on other projects, to your particular project at this time.

Yours very truly,

(S) J. A. Biggs,
JOHN A. BIGGS, *Director,*
The Department of Game.

ROBERT J. SCHOETTLER,
Director of Fisheries.

CITY OF TACOMA

DEPARTMENT OF PUBLIC UTILITIES
OPERATING THE
MUNICIPAL ELECTRIC LIGHT, POWER, WATER AND BELT LINE
RAILWAY SYSTEMS

TACOMA 2, WASH., *April 2, 1952.*

The HONORABLE OSCAR L. CHAPMAN,
Secretary of the Interior,
Washington, D. C.

DEAR MR. CHAPMAN: It has been some time since your letter of February 15, 1952, was received with regard to the Cowlitz Power Development.

We were very pleased to receive your first letter of January 5, with regard to the full cooperation which we might expect from the Fish and Wildlife Service.

As you know, we have entered suit in the Thurston County Superior Court to settle any and all legal questions remaining with regard to the Cowlitz Development as it may be affected by laws of the State of Washington. You probably also know that the Departments of Fisheries and Game of the State of Washington have entered an appeal in the United States 9th Circuit Court of Appeals taking exception to the granting of the license by the Federal Power Commission. These legal actions, undoubtedly, will be carried to their final conclusion. However, it still seems to us that the logical course to pursue

would be to undertake the study of the fisheries problems which the Cowlitz Power Development presents, pending the outcome of litigation.

We cannot help but be in agreement with the statement which Dr. Meehan made before the Subcommittee of the Committee on Appropriations of the House on the Civil Functions, Department of the Army Appropriations for 1953 in which he stated that: "If it were possible to do some research on the construction of devices that could be used to get fish over the dams, both upstream or downstream, we could probably come up with a fairly sound answer." With regard to the plans of the City of Tacoma he stated that: "If somebody were able to do some research on it to see whether or not it would work, or make it work, that would be helpful.

It seems to us that the delay of research work with regard to the fisheries problem at this particular project is not justifiable even in the face of litigation and regret that you have found it necessary to be a party to such delay.

It is significant that the appropriations which have been requested in the hearings above referred to, involve some $2,438,935 which is to be spent by the State of Washington under your direction; that no mention is made, in requesting these monies, of research which should be done to solve the problem; and further, reference to the license granted by the Federal Power Commission on the Cowlitz assumes the loss of the spawning areas in that stream.

We would appreciate your reconsideration of this matter and assignment immediately of some one from your staff of the Fish and Wildlife Service to approach these problems constructively.

Yours very truly,

C. A. Erdahl,
Commissioner of Public Utilities.

CITY OF TACOMA
DEPARTMENT OF PUBLIC UTILITIES
OPERATING THE
MUNICIPAL ELECTRIC LIGHT, POWER, WATER AND BELT LINE
RAILWAY SYSTEMS

TACOMA 2, WASH., *July 1, 1952.*

FEDERAL POWER COMMISSION,
100 McAllister Street
San Francisco 2, Calif.

Attention: Mr. Lesher S. Wing,
Regional Engineer 100–2 CORRES.
Subject: Project No. 2016—Washington,
Cowlitz Power Development,
Article 30, Opinion No. 221.

GENTLEMEN: In acordance with Article 30 of above subject Opinion No. 221, we are submitting herewith our quarterly report.

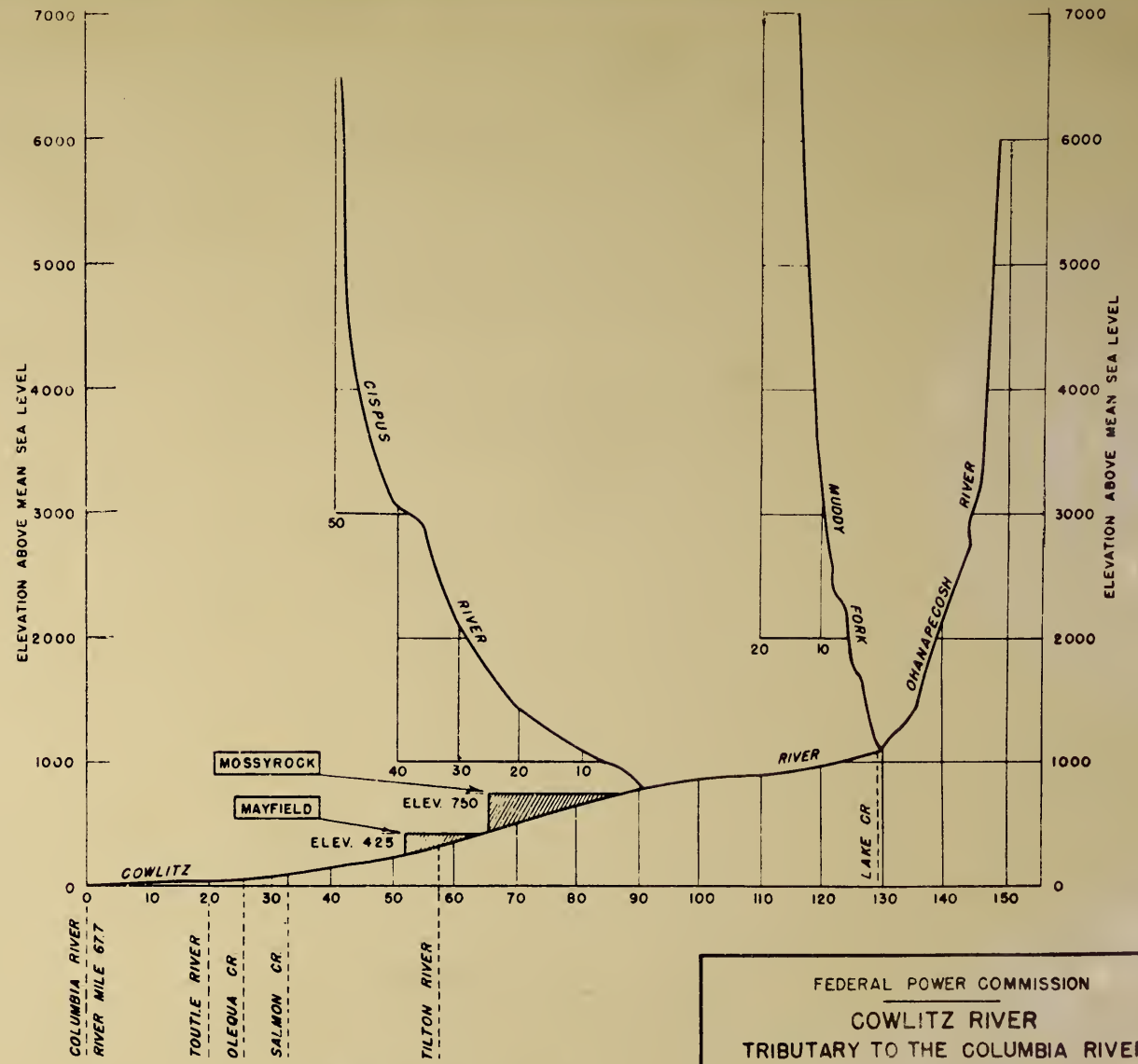
Studies are being continued on details of the drawings showing fishway facilities at both dams. Further data is being obtained on fishways now in operation or proposed in this country and abroad.

No further progress has been made in the furtherance of studies with or securing the cooperation of the State Departments of Fisheries and Game or the Fish and Wild Life Service pending court decisions covering the suits now in the Thurston County Superior Court and Circuit Court of Appeals in San Francisco. Explanation of this situation was outlined in our letter of April 17th.

Yours very truly,

J. FRANK WARD,
Superintendent, Light Division.

U. S. GOVERNMENT PRINTING OFFICE: 1953



REFERENCE - CHART 2, AND MAP 4-B
HOUSE DOCUMENT NO. 666
71 ST CONGRESS, 3RD. SESSION

FEDERAL POWER COMMISSION

COWLITZ RIVER
TRIBUTARY TO THE COLUMBIA RIVER
PLAN AND PROFILE

APPLICATION FOR LICENSE-PROJECT NO. 2016

No. 13294

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM E. HOTH, ROSE E. HOTH and GUY F. WHITMAN,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-26-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS, and
KENNETH J. SELANDER,
Attorneys for Appellant,
1017 U. S. Courthouse,
Seattle 4, Washington.

RAYMOND A. REISER,
Attorney for William E. Hoth and
Rose E. Hoth, Appellees,
648 Central Building,
Seattle 4, Washington.

DONALD M. BUSHNELL,
Attorney for Guy F. Whitman, Appellee,
P. O. Box 296,
Ferndale, Washington.

United States District Court, Western District of Washington, Northern Division

Civil Action—No. 2735

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM E. HOTH, Greeley, Colorado; MRS. ROSE E. HOTH, Box 83, Wheatland, Wyoming; DAVID A. WHITMAN, 19 West Thomas Street, Seattle, Washington; PHILIP K. WHITMAN, c/o Phoenix Mutual Life Insurance Company, New York, New York; GUY F. WHITMAN, Route No. 2, Blaine, Washington; and PAUL DONLEY, 4170 - 17th Street, San Francisco, California,

Defendants.

COMPLAINT IN THE NATURE OF A BILL OF INTERPLEADER

Comes now the plaintiff, United States of America, by its attorney, J. Charles Dennis, United States Attorney in and for the Western District of Washington, and brings this action against William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman and Paul Donley, and would respectfully show the Court as follows:

I.

That this is an action in the nature of a bill of interpleader brought by the plaintiff pursuant to

Section 19 of the World War Veterans Act of 1924, as amended, and Section 617 of the National Service Life Insurance Act of 1940, as amended (Sections 445 and 817, Title 38, U.S.C.A.), against the defendants herein named, who have, or claim to have, an interest in a certain policy of National Service Life Insurance issued by the plaintiff, United States of America, to John M. Donley (Army Serial No. 39, 173, 318); that the present addresses of the defendants are as follows: William E. Hoth, Greeley, Colorado; Mrs. Rose E. Hoth, Box 83, Wheatland, Wyoming; David A. Whitman, 19 West Thomas Street, Seattle, Washington; Philip K. Whitman, c/o Phoenix Mutual Life Insurance Company, New York, New York; Guy F. Whitman, Route No. 2, Blaine, Washington; and Paul Donley, 4170 - 17th Street, San Francisco, California.

II.

That the insured, John M. Donley, entered into active duty in the United States Army on April 10, 1942, and that he died on July 12, 1943, while in the service; that while in the aforesaid service, the insured, on June 3, 1943, applied for and was granted a $10,000.00 contract of National Service Life Insurance (identified by Certificate No. N-11 661 432), in which he designated Barbara Mae Donley, described as wife, as sole beneficiary, and that the insurance contract was in full force and effect at the time of the insured's death.

III.

That by virtue of the death of the insured, John

M. Donley, the insurance contract issued to him matured and insurance benefits were paid to Barbara Mae Donley, widow and designated sole beneficiary, in monthly installments of $55.10, from July 12, 1943, through January 11, 1946, totaling the sum of $1,653.00; that the designated sole beneficiary died on December 25, 1945; that, while the plaintiff stands ready and willing to pay any and all further sums of money due under the policy to the person or persons lawfully entitled thereto, a dispute as to the person or persons entitled to receive such payments has arisen, and that, by reason of the conflicting claims and interests of the defendants herein, doubt exists as to which of the defendants is entitled to receive the said insurance, and this plaintiff cannot safely pay the same to any one or more of them without the aid of this court; that the plaintiff, United States of America, disclaims any interest in said funds except to pay the same to the person or persons found by the court to be legally entitled thereto.

IV.

That claims alleging entitlement to the benefits of the aforesaid insurance were filed in the Veterans Administration by the defendants, William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman, and Paul Donley.

V.

That notice of the intention to institute this action was given to each of the said defendants, except Paul Donley, by letters dated September 7, 1950,

and that as to the said Paul Donley, notice was given by letter dated December 15, 1950, from the Veterans Administration; the said notices were given pursuant to Section 19 of the World War Veterans Act of 1924, as amended (Section 445, Title 38, U.S.C.A., incorporated by reference in Section 817 of the said Title).

Wherefore, this plaintiff prays that the defendants, and each of them, be cited to appear and answer herein and that the court determine the rights of said defendants, and each of them, and direct payment of said insurance benefits to such person or persons as the court may determine is entitled thereto, and that this plaintiff, the United States of America, be forever released from any and all liability on account of the insurance contract issued to John M. Donley, and be granted any further relief to which the plaintiff may show itself to be justly entitled.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue Summons and deliver to the Marshal for service, together with copies of Complaint.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

ORDER FOR ISSUANCE OF SUMMONS

The United States of America having filed a complaint in the nature of a bill of interpleader in the above cause, the Clerk of the above-entitled court is hereby directed to issue a summons directing the defendans above named, and each of them, to appear on Monday, May 14, 1951, and the United States Marshals for the various districts where the defendants reside are hereby directed to serve the same upon the defendants named therein.

Done in Open Court this 12th day of March, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed March 12, 1951.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendants: William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman, and Paul Donley.

You are hereby summoned and required to serve upon: J. Charles Dennis, U. S. Attorney, plaintiff's attorney, whose address is 1017 United States Courthouse, Seattle 4, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] MILLARD P. THOMAS,
Clerk of Court.

By /s/ WILLIAM FERGUSON,
Deputy Clerk.

Date: March 8, 1951.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the ... day of ....., 19.., I received this summons and served it together with the complaint herein as follows: Returned Unserved Request, U. S. Attorney,

March 15, 1951. (See Later Order of March 12, 1951.)

J. S. DENISE,
U. S. Marshal.

By /s/ DONALD F. MILLER,
Chief Deputy.

[Endorsed]: March 14, 1951.

UNITED STATES MARSHAL'S RETURN

Re: Western District of Washington, Seattle, Washington. United States v. William E. Hoth, et al.—Civil Action No. 2735.

I hereby certify and return that on the 16th day of March, 1951, I received a summons together with a complaint in the nature of a Bill of Interpleader, in the above-entitled case, at Cheyenne, Wyoming, and I served the summons together with the complaint in the nature of a Bill of Interpleader upon Mrs. Rose E. Hoth, personally and in person, at her home, at Wheatland, Platte County, Wyoming, on March 16th, 1951.

EARL R. BURNS,
United States Marshal, District of Wyoming.

By /s/ GEORGE G. SMITH, JR.,
Deputy.

[Endorsed]: Filed March 19, 1951.

[Title of District Court and Cause.]

RETURN ON SERVICE OF WRIT

United States of America,
Western District of Washington—ss.

I hereby certify and return that I served the annexed Summons and Complaint on the thereinnamed Guy E. Whitman by handing to and leaving a true and correct copy thereof with him personally at Rt. 2, Blaine, Wash., in said District on the 23rd day of March, 1951.

J. S. DENISE,
U. S. Marshal.

By /s/ DONALD F. MILLER,
Chief Deputy.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendants: William H. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman and Paul Donley:

You, and Each of You, are hereby summoned and required to serve upon J. Charles Dennis, United States Attorney for the Western District of Washington, plaintiff's attorney, whose address is 1017

United States Courthouse, Seattle 4, Washington, on or before Monday, May 14, 1951, an answer to the complaint which is herewith served upon you. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: March 12, 1951.

MILLARD P. THOMAS,
Clerk of Court.

By LEE L. BRUFF,
Deputy Clerk.

Returns on service of writ acknowledged.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

APPEARANCE

To: J. Charles Dennis, United States Attorney for the Western District of Washington, Attorney for the United States of America in the above-entitled action, and to Mrs. Rose R. Hoth, David A. Whitman, Philip K. Whitman, Guy P. Whitman and Paul Donley.

You, and Each of You, will hereby please take notice that Raymond A. Reiser, attorney at law, hereby enters his appearance for the defendants William N. Hoth and Rose R. Hoth, his wife, and you will please serve all notices, pleadings, and

papers in connection with said case upon him at his address stated below.

/s/ RAYMOND A. REISER,
Attorney for Defendants William N. Hoth and Rose R. Hoth, his wife.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1951.

[Title of District Court and Cause.]

APPEARANCE

To: J. Charles Dennis, United States Attorney for the Western District of Washington, Attorney for the United States of America in the above-entitled action, and to William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman and Paul Donley.

You, and Each of You, will hereby please take notice that Donald M. Bushnell, attorney at law, hereby enters his appearance for the defendant Guy F. Whitman, and you will please serve all notices, pleadings and papers in connection with said case upon him at his address stated below.

/s/ DONALD M. BUSHNELL,
Attorney for Defendant Guy F. Whitman.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

ANSWER TO INTERPLEADER AND STATEMENT OF CLAIM

Now comes Guy F. Whitman by Donald M. Bushnell, his attorney, and for answer to the Complaint in this Cause, states:

I.

That he admits the allegations of Paragraphs I and III in the Complaint.

II.

That he admits the allegations of Paragraph III except that he has no information sufficient to form a belief as to the amounts paid to Barbara Mae Donley.

III.

That he admits the allegations of Paragraphs IV and V of said Complaint.

IV.

That by virtue of the laws of the United States in such case made and provided the monthly installments under the insurance policy mentioned in the Complaint remaining unpaid at the death of Barbara Mae Donley, the named beneficiary therein, became payable first to the child or children of the said insured, John M. Donley, or if there were no such child or children then to his parent or parents, or if there were no parent or parents then became payable to such person who may last have stood in the position of in loco parentis to the said John M.

Donley; that the said John M. Donley left no child or no parent him surviving; that this defendant, Guy F. Whitman, was the stepfather of the said John M. Donley, having married his mother at the time when the said John M. Donley was approximately two years old and this defendant stood as a father to and in loco parentis to the said John M. Donley during all of the remaining lifetime of the said John M. Donley, and particularly in that the said John M. Donley resided in the home of this defendant until he was approximately eleven or twelve years of age, and then was removed by a legal guardian appointed over him and was in the custody of such guardian for approximately six or seven years, and thereafter, and voluntarily left the custody of the said guardian and resumed living in the home of this defendant and under his parental guidance and in the relationship to him of in loco parentis; that this defendant was the last and the only person who stood in the relation of in loco parentis to the said John M. Donley.

Wherefore This Defendant Prays that this Court enter judgment awarding to him the benefits and payments available under the policy of life insurance mentioned in the said Complaint and for his costs in this action and for such other relief as may be proper.

/s/ DONALD M. BUSHNELL,
Attorney for Defendant Guy F. Whitman.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

ANSWER TO BILL OF INTERPLEADER AND STATEMENT OF CLAIM

Come Now Rose E. Hoth and William E. Hoth, by their attorney, Raymond A. Reiser, and for answer to the complaint in this cause allege:

I.

In answer to Paragraphs I and II thereof, defendants admit the same.

II.

In answer to Paragraph III thereof, the defendants admit the same except they allege they have not sufficient information on which to base a belief as to the amounts paid to Barbara Mae Donley.

III.

Answering Paragraphs IV and V thereof, the defendants admit the same.

By Way of Further Answer and Statement of Claim

I.

The benefits of the National Service Life Insurance on the life of the insured John M. Donley, identified by certificate number N11661432, are hereby claimed by the defendants William E. Hoth and Rose Hoth on the grounds and for the reason that they were the last persons who stood in loco parentis to the decedent at the time of his death and for more than one year prior to his entry into the military service.

II.

In support thereof defendants allege that John Donley, deceased, was born on July 28, 1914, near Bayard, Morrill County, Nebraska, the son of John Franklin and Sadie A. Donley; that the father of the insured died on or about February 7, 1916, survived by his widow, the insured, and Paul Donley; that in May of 1917, Sadie A. Donley married Guy F. Whitman, a claimant herein, at Bridgeport, Nebraska; that this family moved to Zion, Illinois, the following year; that Sadie A. Donley served as guardian of the estates of her two children until the fall of 1924; that at the death of their father, the deceased, John M. Donley, and his brother inherited in excess of $5,000.00; that the claimant Guy F. Whitman and Sadie A. Donley expended the bulk of the estate of the children for living expenses and without accounting for same; that the claimant Guy F. Whitman provided little or nothing toward the care, support and maintenance of his stepchildren; that Sadie A. Whitman died in the fall of 1924; that on October 5, 1925, one Ralph J. Dady was appointed guardian of the estates of the children by the Probate Court of the State of Illinois, County of Lake, in cause number 14071; that said appointment was necessitated by virtue of the lack of interest, attention and affection on the part of the stepfather of the children following the death of his wife, Sadie A. Whitman.

That early in 1925, one Will Donley, an uncle of John and Paul Donley, visited his nephews, then living with Guy F. Whitman, and, being dissatisfied with the living conditions of his nephews, sought

their custody and control; that Guy F. Whitman readily and voluntarily relinquished the care, custody and control of these children and delivered them to the said Will Donley; that on or about March 15, 1925, the said Guy Whitman, having remarried, relinquished custody and control of the children to the said Will Donley, and he voided himself of any parental control or authority over them; that the said Will Donley, finding himself financially unable to care for the children, approached the defendants Rose Hoth, the aunt of the children John and Paul Donley, and William E. Hoth, her husband, an uncle by marriage, and requested them to care for the children; that in answer to this request, the said Rose Hoth and William E. Hoth sent Will Donley, the sum of $100.00 in payment of transportation expense for the children; that the deceased, John M. Donley, and his brother Paul came to live with the defendants William E. Hoth and Rose Hoth during the month of August, 1925, and remained in their household subject to their discipline, care and affection from that time until subsequently emancipated; that on or about March 23, 1926, Rose Hoth obtained letters of guardianship from the District Court of Platt County, Wyoming, for the purpose of requiring an accounting of Ralph J. Dady and did subsequently obtain an accounting and a discharge of Ralph J. Dady as guardian of the estate of the children and recovered approximately $3000.00, representing the balance due on a judg-

ment against the surety of Sadie A. Whitman; that said sum was subsequently expended by the said Rose Hoth for the care and maintenance of John and Paul Donley, but said sum represented a mere pittance of the cost of the care, support and maintenance of John and Paul Donley, and merely served to supplement the funds expended for their care and support; that during the ensuing years, the defendants exercised parental control and authority over John and Paul Donley and looked after and provided for their education, training and discipline until such time as they were fully grown and capable of taking care of themselves; that said guidance, influence and control was exercised by the defendants Rose and William E. Hoth over the said John Donley until his third year of high school, at which time he sought employment on local ranches, maintaining his home, however, with the Hoths until the summer of 1934; that during the ensuing years, the insured was emancipated and engaged in various types of employment throughout Wyoming, Colorado, and Washington; that in the summer of 1934, he contacted the defendant Guy F. Whitman regarding job conditions in the State of Washington, and, being favorably impressed with the existing conditions in Washington, visited the said Guy F. Whitman at his home in Wenatchee, Washington, remaining with him several months until his arrest for car theft in December of 1934; that the said insured was sentenced to the Washington State Reformatory where he remained until August of 1935; that in November of 1935, the insured enrolled in the Civil-

ian Conservation Corps where he remained for a period of approximately nineteen months, being discharged therefrom on May 27, 1937; that the insured enlisted in the United States Army on April 10, 1942, and subsequently married Barbara Mae Dyment of Leavenworth, Washington, and died without issue surviving.

That subsequent to the abandonment of John and Paul Donley on or about March 15, 1925, the defendant Guy F. Whitman expressed no interest whatsoever in the welfare of the insured and his brother Paul, but, to the contrary, deplored their existence; that the said Guy F. Whitman, though the stepfather of the insured, at no time was in loco parentis to the insured, and that following the death of their mother, Sadie Whitman, the only parental authority to which John Donley was ever subjected was that of William E. and Rose Hoth, who last stood in the position of loco parentis to the insured since August of 1925.

Wherefore, the defendants William E. and Rose Hoth pray that this court enter judgment denying the claim of Guy F. Whitman and awarding to them the benefits of the National Service Life Insurance policy alleged in the complaint together with their costs and disbursements herein, together with such other relief as to the court may be deemed equitable in the premises.

/s/ RAYMOND A. REISER,

Attorney for Defendants William E. and Rose Hoth.

[Endorsed]: Filed June 1, 1951.

[Title of District Court and Cause.]

AFFIDAVIT IN RESISTANCE TO MOTION FOR CHANGE OF SITUS OF TRIAL

Comes Now William E. Hoth and Rose Hoth, his wife, defendants herein, by their attorney, Raymond A. Reiser, and oppose the motion of the defendant Guy F. Whitman that the trial of this cause be held at Bellingham, Washington, and respectfully request the court to hear this matter at Seattle, Washington. This motion is based on the affidavit hereinafter set forth.

/s/ RAYMOND A. REISER,
Attorney for Defendants William E. Hoth and Rose E. Hoth.

State of Washington,
County of King—ss.

Raymond A. Reiser, being first duly sworn on oath, deposes and says:

That he is the attorney of record for Rose E. Hoth and William E. Hoth, defendants herein; that the defendant William E. Hoth plans on traveling from Denver, Colorado, to Seattle for this trial; that the expense entailed for this travel is considerable; that William E. Hoth is a pensioner and short of funds, and that the defendant William E. Hoth should not be obligated to further expense in traveling from Seattle to Bellingham for the convenience of Guy F. Whitman; that counsel represents two of the defendants herein; that the transfer

of this cause to Bellingham would necessitate additional expense to the said William E. Hoth as well as to the United States Government, and that the trial of this matter can best be heard in Seattle, King County, Washington.

/s/ RAYMOND A. REISER.

Subscribed and Sworn to before me this 11th day of June, 1951.

/s/ F. M. REISCHLING,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed June 12, 1951.

[Title of District Court and Cause.]

MOTION

Now Comes Guy F. Whitman, Defendant herein, and by Donald M. Bushnell, his attorney, and respectfully moves that trial of this Cause be held at Bellingham, Washington. This Motion is based upon the Affidavit hereinafter set forth.

/s/ DONALD M. BUSHNELL,
Attorney for the Defendant Guy F. Whitman, Ferndale, Washington.

Affidavit

State of Washington,
County of Whatcom—ss.

Donald M. Bushnell, being first duly sworn, states that he is the Attorney of record for Guy F. Whit-

man, defendant and movant above; that said Guy F. Whitman and his Attorney both reside in Whatcom County, Washington, and that the said Defendant is the only party who has appeared residing in the State of Washington.

/s/ DONALD M. BUSHNELL.

Subscribed and sworn to before me this 6th day of June, 1951.

[Seal] DAILY S. WYATT,
Notary Public in and for the State of Washington,
Residing at Ferndale.

Receipt of copy acknowledged.

[Endorsed]: Filed June 12, 1951.

[Title of District Court and Cause.]

INTERROGATORIES

Comes Now Rose Hoth and William E. Hoth, by Raymond A. Reiser, their attorney, and under the provisions of Rule 33, Federal Rules of Civil Procedure, propounds the following interrogatories to Guy F. Whitman, defendant herein, for answer:

1. When and where was John Donley born?
2. When and where were you married to Sadie A. Donley?
3. How many children were born to you and Sadie A. Donley during your marriage?
4. At the time of your marriage to the said

Sadie A. Donley, how old were Paul and John Donley?

5. What was your occupation and salary at the time of your marriage to Sadie A. Donley?

6. Where did you live following your marriage to Sadie A. Donley?

7. Did Paul and John Donley live with you and Sadie A. Donley?

8. When did you move to Zion, Illinois?

9. What was your occupation while in Zion, Illinois? Your salary?

10. Who were the members of your household during the time you lived in Zion, Illinois?

11. At what address did you live in Zion, Illinois?

12. Paul and John attended what schools?

13. Did you pay tuition for either John or Paul while attending school in Zion, Illinois?

14. Do you have any record of expenses paid by you on behalf of John Donley while he was a member of your household up to and including the time he went to live with his uncle?

15. Did you make application to be appointed guardian of the estates of John and Paul Donley following the death of their mother? If not, why?

16. What was the date of death of Sadie A. Donley?

17. When did you remarry following the death of Sadie A. Donley?

18. Who did you marry? Was it one Elinor Martin?

19. Following the death of Sadie A. Donley, who

cared for John and Paul Donley prior to your remarriage?

20. How long were John and Paul Donley in your household following your remarriage? Who were the members of this household?

21. Have you any record of expenses during the time in which John and Paul Donley were members of your household following the death of their mother? What records do you have?

22. What proportion of your income was spent for the care, maintenance and support of John and Paul Donley following the death of their mother?

23. Prior to the death of the mother of John and Paul, did she give you any specific instructions regarding their custody and support in the event of her death? If so, what were these instructions?

24. When were John and Paul Donley taken from you?

25. What were the circumstances surrounding the relinquishment of these children?

26. To whom were they given?

27. Did you ever write W. H. Donley, or any other person, in the spring of 1925 advising him that you were unable to take care of the children and would like him to take them?

28. If you contacted someone other than W. H. Donley, who did you contact?

29. Do you have the letters in response to your inquiry?

30. Do you have the letters written by the relatives of the deceased Sadie Donley surrounding the acceptance of the children by them?

31. If so, where are these letters and in whose possession are they?

32. Did you ever contact anybody with regard to the adoption of John and Paul Donley? If so, who? When? Where?

33. Did you relinquish custody of John Donley to anyone in 1925? If so, to whom?

34. In your complaint, you state that "John M. Donley resided in the home of this defendant until he was removed by a legal guardian appointed over him * * *," what was the name of that guardian?

35. Why was he appointed?

36. What attempt did you make to be appointed? Result?

37. How did W. H. Donley acquire possession of John and Paul Donley?

38. How much money did you give John and Paul Donley at the time you relinquished their possession?

39. What luggage, if any, did John take with him when he left with W. H. Donley?

40. In the years immediately following the relinquishment of possession to W. H. Donley, how much did you contribute to W. H. Donley or others for the care, support and maintenance of John and Paul Donley?

41. What records did you keep of these contributions?

42. Did you submit an income tax return for 1925, 1926, 1927 and the years through 1933?

43. Where did you submit these income tax returns?

44. Did you claim John and Paul Donley on your income tax returns as dependents for the period 1925 to 1935? If not, whom did you claim as dependent?

45. Who were the members of your household during these years?

46. Did you ever send any clothing or gifts to John and Paul Donley during these years?

47. If so, when and in what amounts? Through whom did you send these gifts?

48. When the children were sent from the residence of W. H. Donley to Rose and William Hoth, did you pay their transportation?

49. If so, in what amount and to whom? If not, who did?

50. Did you receive any letters from John and Paul during the period 1925 through 1935?

51. Do you have these letters?

52. Did you write John or Paul Donley during this period? If so, how often?

53. Did you pay any medical, dental, hospital or tuition fees for John or Paul Donley during the period of 1925 to 1933?

54. If so, when, where and in what amounts?

55. Where did you live during the period 1925-1935?

56. What was your occupation? Your salary?

57. Did John Donley ever contact you following

his departure from your home in 1925? If so, when? What were the circumstances?

58. What do you know of the circumstances surrounding the departure of John from the Hoth household?

59. Did he contact you regarding job conditions in Washington sometime early in 1934?

60. When did he first come to see you following this contact?

61. Where were you living at the time?

62. Who were the members of your household?

63. How old were you then?

64. What was your occupation in 1934?

65. What was your salary for the years 1934 through 1942?

66. Did you file income tax returns for the years 1934 through 1942? If so, where?

67. Whom did you claim as dependents on your income tax returns for the years 1934 through 1942?

68. How much did John Donley contribute to your support during each year commencing in 1934 and ending in 1941?

69. How much did you contribute for the care, support and maintenance of John Donley during the years 1934 through 1941, inclusive?

70. What records, if any, do you have of expenses paid by you for the care, support and maintenance of John Donley during this time?

71. Where were you living at the time John was arrested for car theft in December of 1934?

72. When was he paroled from the Washington State Reformatory?

73. When did John join the Civilian Conservation Corps?

74. How old was he then?

75. Where did John join the Civilian Conservation Corps?

76. Where and how often did John visit you during his period in the Civilian Conservation Corps?

77. When did you move from Wenatchee to Blaine, Washington?

78. How often did John visit you at your home in Blaine, Washington?

79. Who did he bring along with him when he made these calls?

80. What clothing, if any, did John keep at your home in Blaine, Washington?

81. Who were the members of your household while you lived at Blaine, Washington, prior to 1942?

82. Whom did John marry?

83. Did you ever see his wife? When, where and under what circumstances?

84. What did you send John as a wedding present?

85. Did you serve as the executor of the estate of the wife of John Donley?

86. How often did you receive letters from John during the time he was in the military service?

87. How often did you write John?

88. Do you have the letters received from John during the time that he was in the military service?

89. Whom do you intend to call as witnesses in your behalf in this matter?

90. Did anyone assist you in the preparation of the answers to these interrogatories? If so, who and to what extent?

/s/ RAYMOND A. REISER,
Attorney for Defendants William E. Hoth and Rose Hoth.

[Endorsed]: Filed June 28, 1951.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Guy F. Whitman hereby submits the following as his answers to the interrogatories propounded by the defendants William E. Hoth and Rose Hoth, the answers being numbered to correspond with the numbers of said interrogatories.

1. I believe on a farm near Bayard, Nebraska, July 28, 1914.

2. Bridgeport, Nebraska. May 2, 1917.

3. Three.

4. John about 2¾ years; Paul about 2 years younger.

5. I was a cattle rancher. I was not on salary.

6. On my ranch near Bridgeport, Nebraska.

7. Yes.

8. June, 1918.

9. I lived in town until the spring of 1919 while I worked preparing the farm we had acquired, putting down a well and building a house. The farm

was about three miles out of town. I farmed there until February, 1923; that date is the best I can remember. Then I worked in a creamery in town for one year. Then I worked mixing mortar and carrying hod for plasterers for five years. For a little while I made brooms on the side, evenings, to help pay expenses. I had no salary on the farm. At the creamery I earned $150.00 per month. Carrying hod I started at 60c per hour, then I was raised to 80c per hour. I had some overtime until building slackened. I think my average carrying hod was about $48.00 per week.

10. At the beginning, myself, my wife Sadie, and my two stepsons, John and Paul Donley. Later our three children, David Whitman, born March 3, 1918; Phillip, born May 5, 1919; and Ruth Whitman, born, I'm not sure, but I believe it was September 17, 1921. Something more than a year after the death of Sadie Whitman, I married Anna Whitman, October 2, 1923, and she had two children about the ages of John and Paul, or perhaps a bit older, and we all lived in the same household until the Donley boys were taken by their uncle, Will Donley. While I was a widower I had a housekeeper, a former nurse, a widow about 60 years old, take care of the house and children, and she was very good.

11. For the first nine months—West 27th Street, then on the farm, I believe it was called 33rd Street; then first Gabriel Avenue, I believe it was, then on Gideon Street. I don't remember the numbers.

12. John went one or two terms to school on the

33rd Street School, as I remember, and then the Zion School.

13. I don't remember paying any. I believe the schools were free.

14. No.

15. No. I gave it no thought.

16. September 16, 1922, as I remember.

17. October 2, 1923.

18. Anna Martineau. It was not Elinor Martin.

19. The lady I referred to before. She was called Mother Davis. I do not remember her given name.

20. About one year and a half. Anna, my wife, her two children, myself and three children, and John and Paul Donley.

21. None.

22. That is too much for me. I could not say, it was divided up among all the members of the household. We spent it all for living and we all got the same treatment.

23. No.

24. I think it was March, 1925.

25. In the winter or spring of 1925 I saw a lawyer named Theodore Forby, I believe that was his name, at Zion, about adopting John and Paul, myself. As I remember, he told me that an uncle or aunt of the blood had preference over a stepfather as to the right to have children. The next thing that happened that I know was that Will Donley appeared. He was living in or near Danville, Ill. We were at the farm and were quarantined because of scarlet fever. Altogether, for all the

children we were quarantined for 15 weeks that spring. He could not come inside. He talked through the window. As I remember I don't think he said anything then about taking the boys. He went back to Danville, and then he returned to Zion and took the boys. I think he must have seen Mr. Forby. Forby discontinued making out my adoption papers and told me that the uncle and aunt had preference, so I did not try to hold them. Will Donley did promise me that he would return them to me if he did not keep them. I hated to see them go so I asked him if he would return them to me in case that he did not keep them and he said he would.

26. Will Donley.

27. No.

28. ———.

29. ———.

30. I don't know of any such letter.

31. ———.

32. I answered this before.

33. I have already said, to Will Donley.

34. I was told that Will Donley was appointed guardian, at least that is my recollection. I did not give any thought to whether he had any court papers, because of what Mr. Forby told me. I figured that if the uncle and aunt had the preference that all I could do was to let them go. That statement in the complaint may not be exactly right. What I meant to tell my lawyer was that John was removed from my home by his uncle while I was under the belief that the uncle had the right to take him. I don't think I said exactly that he was re-

moved by a legal guardian because I don't know whether Will Donley actually got court papers. Maybe he didn't. It never occurred to me to ask him whether he did, because of what Mr. Forby had told me, that is that the uncle had the right, and I figured all I could do was to let them go.

35. I don't know if he was appointed. I have given you all the information I have on that.

36. I have already answered this.

37. I have explained this above.

38. None.

39. I don't remember whether they took any with them. I do know they had changes of clothing.

40. Nothing.

41. ———.

42. No.

43. ———

44. ———

45. Myself, my wife, my wife's two daughters and my three children.

46. No.

47. ———

48. No. I was not even told about the move.

49. ———

50. The earliest letter that I saved was one from John while he was at St. Patrick's Academy in Sydney, Nebraska. This was postmarked March 2, 1930. I believe he had written me a short time before that, and I replied to that, and this letter of March 2nd was in answer to that reply of mine. I received other letters later in that period from

John but don't believe I got any letters from Paul until after he had left the Hoth's.

51. No, the letters I saved are in the Veterans Administration file.

52. After hearing from John I wrote him from time to time, or others in the family did, I cannot say how often. Ruth, my daughter, and his half-sister wrote him. I would say that someone or other of us wrote him every two or three months until he came to live with us in 1934.

53. No.

54. ———

55. Lived in Zion until August, 1931; then moved to Wenatchee, Washington, and lived there until 1939.

56. I continued hod carrying until about 1930 when building work slumped and I got out of work and did whatever I could find. The lack of work, that was why I went to Wenatchee, thinking I might find something better. While the work kept up at Zion I got the same pay—80c per hour.

57. He wrote from school at Sydney, Nebraska, in or before 1930. I had a sister living at Sydney. I suppose he saw her. I don't have the first letter, and I don't remember what he said, but I think he may have gotten my address from her, or maybe he took a chance that I was still there at Zion and just wrote me there. Then in August, 1932, he wrote not to be surprised if "a big tramp came to the door about November." I remember that phrase in the letter. He said his job would end then. Then he did come in 1934.

58. I can't remember what he said about his reasons when he first wrote me, but after he came to Wenatchee to live with me he told me that he had had a fight with Mr. Hoth and had left and never had gone back. I don't remember what he said the quarrel was about. I did not ask him about the details. What he told me, he told me on his own accord. I don't remember his saying why he left other than that.

59. I can't remember definitely as to that date. In 1932 he wrote my daughter Ruth, his half-sister, if he could earn his clothes, he would come out to Washington with us that summer. I do know that before he came in 1934 he wrote me and I sent him $10.00 to come out on.

60. In the summer of 1934.

61. In Wenatchee, Washington.

62. Myself and sons, David and Phillip, his half-brothers. My wife had gone back to Zion and as I was working I left my daughter, Ruth, with my brothers in the same town most of the time.

63. I was 56 then, was born in 1878.

64. Any work I could get. Fruit picking and thinning apples and cutting wood in winter.

65. I had no salary, just what wages I could make.

66. No.

67. ———

68. The summer of 1934 till he was sent to Monroe Reformatory in the winter of 1935 he contributed nothing. He picked fruit but did not have regular work and what he made was his. I fur-

nished board and lodging. After he was paroled from Monroe in August, 1935, he worked for a while and lived with me but paid nothing. He then joined the Civilian Conservation Corps in November, 1935, and was in through February, 1937. While he was with the CCC he had them send me $25.00 per month out of the $30.00 that he got, as I remember. After that he went into logging and did not send any more money.

69. I contributed board and lodging from about July, 1934, to February, 1935, and for two or three months beginning on August, 1935. After that he would visit off and on.

70. None.

71. In Wenatchee, Washington at Red Apple and Miller Street.

72. August, 1935.

73. Sometime in or before November, 1935.

74. Twenty-one years and about four months.

75. At Wenatchee, Washington, at least while he was staying with me there.

76. I don't believe he had any leaves for visits.

77. September, 1939.

78. Never visited in Blaine. He was in a logging camp during this time until he enlisted in the Air Corp.

79. ———

80. None.

81. I lived alone.

82. Barbara ..... I can't now remember her maiden name.

83. No.

84. Nothing.

85. No.

86. About every month until he went overseas.

87. I replied to each of his letters.

88. No. I gave the only one I saved to the Veterans Administration.

89. I am advised by my attorney that this question is not proper or fair and should not be answered.

90. Yes, my attorney, Donald M. Bushnell. He advised me as to 89. He exhibited his file giving me dates and data concerning letters, and read the questions and took down my answers and they were copied by his stenographer.

/s/ GUY F. WHITMAN.

Subscribed and sworn to before me this 20th day of June, 1951.

[Seal] /s/ DONALD M. BUSHNELL,
Notary Public in and for the
State of Washington.

[Endorsed]: Filed June 28, 1951.

[Title of District Court and Cause.]

NOTE FOR MOTION DOCKET

To: William E. Hoth, Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman and Paul Donley, plaintiffs herein, and to: Raymond A. Reiser, attorney for defendants, William N. Hoth and Rose R. Hoth, his wife; and to Donald M. Bushnell, attorney for defendant, Guy F. Whitman; and

To the Clerk of the Above-Entitled Court:

You, and each of you, will hereby please take notice that defendant, Guy F. Whitman's motion that the trial of this cause be held at Bellingham, Washington, will be brought on for hearing on the 6th day of August, 1951, at the hour of 10 o'clock a.m. or as soon thereafter as counsel may be heard, the Clerk being requested to note the same accordingly on the calendar.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ KENNETH J. SELANDER,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1951.

[Title of District Court and Cause.]

WITHDRAWAL OF MOTION

Now comes Guy F. Whitman, by Donald M. Bushnell, his attorney of record, and withdraws the motion heretofore filed by him in this cause, asking that the case be transferred to the Bellingham docket for trial.

/s/ DONALD M. BUSHNELL,
Att'y for Guy F. Whitman,
Ferndale, Washington.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

MOTION FOR DEFAULT

Comes now the plaintiff herein by and through J. Charles Dennis, United States Attorney, and Kenneth J. Selander, Assistant United States Attorney, and moves that an order of default be entered against the defendants, Philip K. Whitman, David A. Whitman, and Paul Donley.

This motion is based upon the files and records herein and the affidavit of Kenneth J. Selander attached hereto.

Dated this 15th day of November, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ KENNETH J. SELANDER,
Assistant U. S. Attorney.

State of Washington,
County of King—ss.

Kenneth J. Selander, being first duly sworn, on oath deposes and says:

That he is Assistant United States Attorney for the Western District of Washington, as such, one of the attorneys for the plaintiff in the above-entitled action.

That the defendants herein, Philip K. Witman, David A. Whitman, and Paul Donley were duly and regularly served with process in this action by personal service as follows:

Philip K. Whitman at 30 Rockefeller Plaza, New York, New York, on March 21, 1951;

David A. Whitman at 19 W. Thomas Street, Seattle, Washington, on March 20, 1951; and

Paul Donley at 4140 17th St., San Francisco, California, on March 26, 1951.

That since said dates more than sixty days have elapsed, exclusive of the dates of service, and the said defendants, Philip K. Whitman, David A. Whitman and Paul Donley, have utterly failed to file with the Clerk of this Court or to serve upon the attorney for the plaintiff, any appearance, motion, answer, or paper of pleading whatsoever, and the time for so doing has now fully elapsed.

This affidavit is made for the purpose of taking an order of default against the defendants, Philip K. Whitman, David A. Whitman and Paul Donley.

/s/ KENNETH J. SELANDER.

Subscribed and sworn to before me this 16th day of November, 1951.

[Seal] By /s/ LOIS M. STOLSEN,
Deputy.

[Endorsed]: Filed November 16, 1951.

[Title of District Court and Cause.]

ORDER OF DEFAULT

This cause coming on regularly for hearing this day on motion of plaintiff for an order of default, and it appearing to the Court from the records and files in the action that the defendants, David A. Whitman, Philip K. Whitman and Paul Donley, were duly and regularly served with process by the delivery of a copy of the summons and complaint personally to each of said defendants as follows: Philip K. Whitman at 30 Rockefeller Plaza, New York, New York, on March 21, 1951; David A. Whitman at 19 West Thomas Street, Seattle, Washington, on March 20, 1951, and Paul Donley at 4140 17th Street, San Francisco, California, on March 26, 1951, and the defendants having failed since said date to file any appearance, motion or answer whatsoever in said cause, and the time for so doing having fully elapsed, now, therefore, it is hereby

Ordered that the defendants, David A. Whitman, Philip K. Whitman and Paul Donley, be and they hereby are, adjudged to be in default in this action.

Done in Open Court this 16th day of November, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ KENNETH J. SELANDER,
Assistant U. S. Attorney.

[Endorsed]: Filed November 16, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for hearing before the Honorable John C. Bowen, one of the Judges of the above-entitled Court on the 11th day of December, 1951, at Seattle, Washington, the plaintiff appearing and being represented by J. Charles Dennis, United States Attorney, and Kenneth J. Selander, Assistant United States Attorney, the defendants, William E. Hoth and Mrs. Rose E. Hoth, being represented by Raymond A. Reiser, their attorney, and Guy F. Whitman being represented by Donald M. Bushnell, his attorney, and no other parties appearing and the defendants having compromised their differences and having stipulated that a judgment may be entered in accordance therewith the United States of America not being a party to such stipulation and the Court having heard the arguments of counsel and

being fully advised in the premises and having rendered its decision in accordance with said stipulation, now makes the following

Findings of Fact

I.

That all times hereinafter referred to, the National Service Life Insurance Act of 1940, as amended, 38 U.S.C., Sections 445 and 817, Title 38, U.S.C. and Section 617 of the 1940 National Service Life Insurance Act and the World War Veterans Act of 1924, as amended, were in force and effect which provide for the issuance of life insurance policies to service men and veterans of the United States Military Forces and provide for the payment of benefits under said life insurance policies from the National Service Life Insurance fund, and that jurisdiction is conferred upon this Court of the persons and parties to this action under said statutory provisions.

II.

That one John M. Donley entered into active service in the United States Army on April 2, 1942, and that he died on July 12, 1943, while in the service; that while in the aforesaid service, the insured, on June 3, 1943, applied for and was granted a $10,000.00 contract of National Service Life insurance (identified by Certificate No. N-11 661 432), in which he designated Barbara Mae Donley, described as wife, as sole beneficiary, and that the insurance contract was in full force and effect at the time of the insured's death.

III.

That by virtue of the death of the insured, John M. Donley, the insurance contract issued to him matured and insurance benefits were paid to Barbara Mae Donley, widow and designated sole beneficiary, in monthly instalments of $55.10 from July 12, 1943, through January 11, 1946, totalling the sum of $1,653.00; that the designated sole beneficiary, Barbara Mae Donley, died on December 25, 1945; that while the plaintiff stands ready and willing to pay the balance due under the policy to the person or persons lawfully entitled thereto, a dispute arose as to the person or persons entitled to receive such payments; that the plaintiff, United States of America, disclaimed any interest in said funds except to have the same paid to the person or persons found by the Court to be legally entitled thereto.

IV.

That all of the above-named defendants, namely, William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman, and Paul Donley filed claims with the Veterans Administration alleging entitlement to the benefits of the aforesaid insurance.

V.

That notice of the intention to institute this action was given to each of the defendants except Paul Donley by letters dated September 7, 1950, and that as to the said Paul Donley, notice was given by letter dated December 15, 1950, from the Veterans Administration; that said notices were

given pursuant to Section 19 of the World War Veterans Act of 1924, as amended (Section 445, Title 38, U.S.C.A., incorporated by reference in Section 817 of said title).

VI.

That all of the above-named defendants, namely, William E. Hoth, Mrs. Rose E. Hoth, David A. Whitman, Philip K. Whitman, Guy F. Whitman, and Paul Donley, were duly and regularly served with a summons issued by the Clerk of this Court; that appearances have been filed herein on behalf of the defendants, William E. Hoth, Rose E. Hoth, and Guy F. Whitman, only; that an order of default has hereinbefore been entered against David A. Whitman, Philip K. Whitman and Paul Donley under order of this Court dated November 16, 1951.

VII.

That the Court finds from the evidence and the records before it that Guy F. Whitman, William E. Hoth and Rose E. Hoth, all last stood in the position of loco parentis for a period exceeding one year prior to his death and were standing in that relationship to the deceased, John M. Donley, at the time of his death and are entitled to the remaining proceeds of the insurance contract of said deceased which is identified by Certificate No. N 11,661,432.

VIII.

The Court further finds that the defendants, David A. Whitman, Philip K. Whitman and Paul Donley, or any person other than the above-named

parties in loco parentis to the deceased, are not entitled to any interest and proceeds of the insurance of John M. Donley.

IX.

That in accordance with the terms of the said National Service Life Insurance Act of 1940, as amended, and the regulations of the administrator authorized thereby, in accordance with the said policy of life insurance identified by Certificate No. N-11,661,432, the defendant William E. Hoth, as one of the persons who last stood in the position of loco parentis to the deceased, is entitled to the payment of the sum of $3,857.70 by the United States of America on account of said policy, less an allowance to his attorney, Raymond A. Reiser, of a reasonable sum for his services in this action in the amount of 10% of said sum of $385.77.

X.

That in accordance with the terms of the said National Service Life Insurance Act of 1940, as amended, and the regulations of the administrator authorized thereby, in accordance with the said policy of life insurance identified by Certificate No. N-11,661,432, the defendant, Mrs. Rose E. Hoth, as one of the persons who last stood in the position of loco parentis to the deceased, is entitled to the payment of the sum of $3,857.70 by the United States of America on account of said policy, less an allowance to her attorney, Raymond A. Reiser, of a reasonable sum for his services in this action in the amount of 10% of said sum or $385.77.

XI.

That in accordance with the terms of the said National Service Life Insurance Act of 1940, as amended, and the regulations of the administrator authorized thereby, and in accordance with the said policy of life insurance identified by Certificate No. N-11,661,432, the defendant, Guy F. Whitman, as one of the persons who last stood in the position of loco parentis to the deceased, is entitled to the payment of the sum of $3,855.60 by the United States of America on account of said policy, less an allowance to his attorney, Donald M. Bushnell, of a reasonable sum for his services in this action in the amount of 10% of said sum or $385.56.

Done in Open Court this 11th day of December, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

And from the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

I.

That William E. Hoth, as one of the persons who last stood in the position of loco parentis to the deceased, John M. Donley, is entitled to have and recover of and from the United States of America under the National Service Life Insurance policy identified as Certificate No. N-11,661,432, the sum of $3,857.70, of which the sum of $1,322.64 shall be paid to said defendant upon the entry of judgment and of which sum of $3,857.70 the sum of $18.37 shall be paid to said defendant on the 12th day of

January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid, less ten per cent (10%) of the said $3,857.70 to be paid to his attorney as hereinafter set forth.

II.

That Mrs. Rose E. Hoth, as one of the persons who last stood in the position of loco parentis to the deceased John M. Donley, is entitled to have and recover of and from the United States of America under the National Service Life Insurance policy identified as Certificate No. N-11,661,432, the sum of $3,857.70, of which the sum of $1,322.64 shall be paid to said defendant upon the entry of judgment and of which sum of $3,857.70 the sum of $18.37 shall be paid to said defendant on the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid, less ten per cent (10%) of the said $3,857.70 to be paid to her attorney as hereinafter set forth.

III.

That Guy F. Whitman, as one of the persons who last stood in the position of loco parentis to the deceased, John M. Donley, is entitled to have and recover of and from the United States of America under the National Service Life Insurance policy identified as Certificate No. N-11,661,432, the sum of $3,855.60, of which the sum of $1,321.92 shall be paid to said defendant upon the entry of judgment and of which sum of $3,855.60 the sum of $18.36 shall be paid to said defendant on the 12th day of January, 1952, and on the 12th day of each suc-

ceeding month until the balance of the judgment has been paid, less ten per cent (10%) of the said $3,855.60 to be paid to his attorney as hereinafter set forth.

IV.

That Raymond A. Reiser is entitled, as attorney for the defendant, William E. Hoth, to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said sum of $3,857.70 or the sum of $385.77 of which the sum of $132.26 shall be paid upon entry of judgment, and a further sum of $1.84 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid.

V.

That Raymond A. Reiser is entitled, as attorney for the defendant, Mrs. Rose E. Hoth, to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said sum of $3,857.70 or the sum of $385.77 of which the sum of $132.26 shall be paid upon entry of judgment, and a further sum of $1.84 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid.

VI.

That Donald M. Bushnell, is entitled as attorney for the defendant, Guy F. Whitman, to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said

sum of $3,855.60 or the sum of $385.56 of which the sum of $132.19 shall be paid upon entry of judgment, and a further sum of $1.83 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid.

VII.

That the above attorneys' fees are to be deducted from the proceeds of the National Service Life Insurance policy and the Administrator of Veterans Affairs should be directed to make such payments of attorneys' fees to said attorneys.

Done in Open Court this 11th day of December, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ KENNETH J. SELANDER,
Assistant U. S. Attorney.

Approved as to form:

/s/ RAYMOND A. REISER,
Attorney for Defendants, William E. Hoth and Mrs. Rose E. Hoth.

/s/ DONALD M. BUSHNELL,
Attorney for Defendant,
Guy F. Whitman.

[Endorsed]: Filed December 11, 1951.

United States District Court, Western District of Washington, Northern Division

No. 2735

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM E. HOTH, MRS. ROSE E. HOTH, DAVID A. WHITMAN, PHILIP K. WHITMAN, GUY F. WHITMAN, and PAUL DONLEY,

Defendants.

JUDGMENT

This matter having come on regularly for hearing before the Honorable John C. Bowen, one of the Judges in the above-entitled court, on the 11th day of December, 1951, at Seattle, Washington, the plaintiff appearing and being represented by J. Charles Dennis, United States Attorney, and Kenneth J. Selander, Assistant United States Attorney, the defendants, William E. Hoth and Mrs. Rose E. Hoth, being represented by Raymond A. Reiser, their attorney, and Guy F. Whitman being represented by Donald M. Bushnell, his attorney, and no other parties appearing, and the defendants having compromised their differences and having stipulated that a judgment may be entered in accordance therewith, the United States of America not being a party to such stipulation, the court having heard the arguments of counsel, examined the files and records herein, and having heretofore

entered its Findings of Fact and Conclusions of Law in accordance with the aforementioned stipulation, and it appearing that the defendants William E. Hoth and Mrs. Rose E. Hoth, his wife, and Guy F. Whitman last stood in loco parentis to the deceased at the time of his death and for more than one year prior thereto, are the persons entitled to receive the balance of proceeds due under the insurance policy constituting the subject matter of this action, and the court being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the United States of America pay to William E. Hoth as one of the three persons who last stood in loco parentis to the deceased, the sum of $3,857.70 of which sum $1,322.64 shall be paid to the said William E. Hoth upon the entry of this judgment and the balance to be paid at the rate of $18.37 per month on the 12th day of January, 1952, and on the 12th day of each and every month thereafter until the balance of said judgment shall be paid.

It is further Ordered, Adjudged and Decreed that the United States of America pay to Mrs. Rose E. Hoth as one of the three persons who last stood in loco parentis to the deceased, the sum of $3,857.70 of which sum $1,322.64 shall be paid to the said Mrs. Rose E. Hoth upon the entry of this judgment and the balance to be paid at the rate of $18.37 per month on the 12th day of January, 1952, and on the 12th day of each and every month thereafter until the balance of said judgment shall be paid.

It is further Ordered, Adjudged and Decreed that the United States of America pay to Guy F. Whitman as one of the three persons who last stood in loco parentis to the deceased, the sum of $3,855.60 of which sum $1,321.92 shall be paid to the said Guy F. Whitman upon the entry of this judgment and the balance to be paid at the rate of $18.36 per month on the 12th day of January, 1952, and on the 12th day of each and every month thereafter until the balance of said judgment shall be paid.

It is further Ordered, Adjudged and Decreed that Donald M. Bushnell, as attorney for the defendant Guy F. Whitman, is entitled to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said sum of $3,855.60 or the sum of $385.56 of which the sum of $132.19 shall be paid upon entry of judgment, and a further sum of $1.83 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeeding month until the balance of the judgment has been paid. Said attorney's fees to be deducted from the proceeds of the National Service Life Insurance policy and the Administrator of Veterans Affairs is directed to make such payments of attorneys' fees to said attorneys.

It is further Ordered, Adjudged and Decreed that Raymond A. Reiser is entitled, as attorney for the defendant William E. Hoth, to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said sum of $3,857.70 or the sum of $385.77 of which the sum of

$132.26 shall be paid upon entry of judgment, and a further sum of $1.84 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid. Said attorney's fees to be deducted from the proceeds of the National Service Life Insurance policy and the Administrator of Veterans Affairs is directed to make such payments of attorney's fees to said attorney.

It is further Ordered, Adjudged and Decreed that Raymond A. Reiser is entitled, as attorney for the defendant, Mrs. Rose E. Hoth, to have and recover from the plaintiff, United States of America, for his attorney's fees herein, 10% of the said sum of $3,857.70 or the sum of $385.77 of which sum of $132.26 shall be paid upon entry of judgment, and a further sum of $1.84 shall be paid upon the 12th day of January, 1952, and on the 12th day of each succeeding month until the balance of the judgment has been paid. Said attorney's fees to be deducted from the proceeds of the National Service Life Insurance policy and the Administrator of Veterans Affairs is directed to make such payments of attorney's fees to said attorney.

Done in Open Court this 11th day of December, 1951.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ KENNETH J. SELANDER,
Assistant U. S. Attorney.

Approved as to form:

/s/ RAYMOND A. REISER,
Attorney for Defendants, William E. Hoth and Mrs. Rose E. Hoth, His Wife.

/s/ DONALD M. BUSHNELL,
Attorney for Defendant,
Guy F. Whitman.

[Endorsed]: Filed December 11, 1951.

[Title of District Court and Cause.]

STIPULATION OF COMPROMISE AND SETTLEMENT

Comes Now the plaintiff, United States of America, by its attorney, ...; William E. Hoth and Rose E. Hoth, defendants herein, by their attorney, Raymond A. Reiser and Guy F. Whitman, defendant herein, by his attorney, Donald M. Bushnell and stipulate, in compromise and settlement as follows:

Whereas no appearance has been entered by any party to the above-entitled action other than the above-named defendants and an order of default has been or will be entered herein prior to entry of judgment;

Whereas the above-named defendants are aged and distant from the place of trial;

Whereas each of the above-named defendants believe that there is merit to the claim of the other

to the proceeds of insurance in question herein and that each stood in the relation of loco parentis to the deceased for more than one year prior to his demise;

Whereas the plaintiff disclaims any interest in the remaining balance of the proceeds of a contract of National Service Life Insurance (identified by Certificate No. N-11 661 432) and stands ready and willing to pay any and all further sums of money due under said policy to the person or persons lawfully entitled thereto;

Whereas the only remaining claimants herein have resolved their differences and are ready, willing and able to compromise and settle the same, and in accordance with the policy of the law to encourage compromise and settlements.

Now, Therefore, It Is Stipulated and Agreed as Follows:

1. That at the time of the death of John M. Donley, insured, and for a period of more than one year prior to his death, Guy F. Whitman, stepfather; William E. Hoth, uncle, and Rose E. Hoth, aunt, all last stood in the relation of loco parentis to the deceased and are equally entitled to share the remaining proceeds of National Service Life Insurance issued by the United States of America to the deceased.

2. That in the event of any of the above-named parties die prior to the time the entire proceeds of said insurance have been fully paid, then, and in

that event, the remaining sum shall be paid to the survivor or survivors, share and share alike.

3. That the findings of fact and conclusions of law hereto attached are approved as to form and incorporated herein by reference as though more fully set forth herein.

4. That 1/10th of the proceeds of insurance awarded to each of the above-named claimants is a reasonable sum to be awarded his or her attorney as attorney's fees herein.

Nov. 8, 1951.

/s/ RAYMOND A. REISER,
Attorney for William E. Hoth and Rose E. Hoth.

Nov. 27, 1951.

/s/ DONALD M. BUSHNELL,
Attorney for Guy F. Whitman.

It Is So Ordered This .. day of ....., 19...

.....,
Judge.

[Endorsed]: Filed December 11, 1951.

United States
Department of Justice
Washington 25, D. C.

(Copy)
AHB:PCC:mem
146-55-1125

Oct. 5, 1951.

Registered
J. Charles Dennis, Esquire,
United States Attorney,
Seattle 4, Washington.

Re: United States vs. William E. Hoth, et al. Civil No. 2735.
(Donley, John M.—XC-3 279 030)

Dear Mr. Dennis:

This has reference to your letter of September 17, 1951, forwarding the Veterans Administration file and advising that the parties to the suit desired to settle the matter by dividing the unpaid benefits among three of the six defendants. In this connection, it is presumed that William E. Hoth, Rose E. Hoth and Guy F. Whitman are the claimants to receive the benefits under this agreement. In support thereof Raymond A. Reiser, attorney for William E. Hoth, cites the case of Hennings vs. United States, 93 Fed. Supp. 380.

Our file indicates that following the death of Barbara Mae Donley, the insured's wife and sole designated beneficiary, claims for the remaining installments were filed by the six defendants to this action. Since no contingent beneficiary was named,

the remaining installments of the insurance became payable under the laws relating to devolution. The devolution Section of the Act (802 (h) (3) of Title 38 U.S.C.A.) provides that where an insured veteran is not survived by a widow, child or children the insurance should be paid to the parent or parents "who last bore that relationship" in equal shares. It is further provided that if the insured was not survived by parent or parents, the next preferred persons are the brothers and sisters of the insured.

In the instant case the file indicates that the insured was not survived by a child or children or a natural parent. His wife survived him, but died shortly thereafter. Therefore, the question as to the person or persons entitled to the unpaid benefits depends upon who or whom in fact stood in loco parentis to the insured for the period of time required by the Act. This is a question which must be determined by the Court upon the basis of evidence adduced before the Court and not left to the parties to decide, as is proposed by the attorney for William E. Hoth. Of course, the full and half brothers of the insured would not be entitled to the proceeds if any one or more of the claimants established that they were in loco parentis to the insured.

In addition to the foregoing, the case may not properly be disposed of upon the basis of an assignment under Section 816 of Title 38 U.S.C.A., the only method authorized by law for settling of disputes to the proceeds of policies of National Service Life Insurance. Consequently, it will be necessary that the case proceed to trial upon the issue of fact

as to whether any one or more of the claimants stood in the relationship of a parent to the insured within the meaning of the National Service Life Insurance Act. Of course, if the Court finds in favor of one and to the exclusion of the other claimants, the Government will not concern itself with any private agreements which they may enter into with respect to a division of the proceeds of the insurance if and when they are paid by the Veterans Administration pursuant to the judgment to be entered by the Court.

Accordingly, it will be seen that the case of Hennings vs. United States, supra, is not authority for the method of settlement desired by the parties since the Court is required, on the basis of evidence presented at the trial, to determine whether a party or parties stood in loco parentis to the insured as provided by the Act.

We have not been furnished with a copy of the defendants' answers and if such have been filed, it is requested that you forward copies for our files. The Veterans Administration file is being returned for your use in the trial of this action.

Sincerely yours,

For the Attorney General,

/s/ HOLMES BALDRIDGE,
Assistant Attorney General.

[Endorsed]: Filed December 14, 1951.

Office of
Solicitor.

June 23, 1950.
XC-3 279 030
Donley, John M.

Honorable Henry M. Jackson, M.C.,
House of Representatives,
Room 1428, House Office Building,
Washington, D. C.

Dear Mr. Jackson:

Your letter of June 13th, enclosing letter from Mr. Donald M. Bushnell, attorney at law, Ferndale, Washington, has been duly received and the questions presented thereby considered.

It is noted that Mr. Bushnell states that Mr. Whitman is willing to settle the question of entitlement to remaining unpaid installments of the insurance on the life of the above-named serviceman by an equal division thereof with Mr. William E. Hoth and his wife, Mrs. Rose Hoth, apparently so as to obviate the necessity for legal proceedings and the delay incident thereto.

Section 616 of the National Service Life Insurance Act of 1940, as amended (S. 816, Title 38, U.S.C.A.) reads as follows so far as is pertinent:

> "* * * Provided, That assignments of all or any part of the beneficiary's interest may be made by a designated beneficiary to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister of the insured, when the designated contingent beneficiary, if

any, joins the beneficiary in the assignment, and if the assignment is delivered to the Veterans' Administration before any payments of the insurance shall have been made to the beneficiary: Provided further, That an interest in an annuity, when assigned, shall be payable in equal monthly installments in such multiple of twelve as most nearly equals the number of installments certain under such annuity, or in two hundred and forty installments, whichever is the lesser." (Emphasis added.)

The sole designated beneficiary of the insurance in question was Barbara Mae Donley, wife of the insured, who is reported to have died on December 25, 1945. No contingent beneficiary was named by the insured, and therefore, an assignment such as contemplated by the above-quoted provision of the statute cannot be made in this case. Another reason it cannot is that numerous payments have already been made to the designated beneficiary. On the other hand it appears that the right to the remaining unpaid installments is determinable by application of the provisions of subsection 602 (h) (3) of the Act, as amended. Since the insured left surviving him no children and his widow has since died, and since the insured's natural parents are both dead, the contest here involved is one between persons who claim to have last occupied the relationship of "parent" to the insured within the contemplation of subsection 602 (h) (3) (C) and Section 601 (f) of the Act.

The Veterans Administration has heretofore taken the position, in Administrator's Decision No. 792, August 30, 1948, that the legal status of "in loco parentis," which is by Section 601 (f) of the Act included within the definition of the term "parent," can embrace at most only one father and one mother at the same time, and therefore it would be placed in the anomalous position of recognizing the existence of two persons occupying the position of the father to the insured contemporaneously if it now gave its approval to a division of the proceeds of the insurance in question. Not only that, but its authority to do so is highly questionable, in view of the above-quoted provisions of the Act.

For the foregoing reasons it is believed that the most feasible solution under the circumstances is to allow the entitlement of the parties to be determined by the courts. It may be added that this course appears to be desirable for the additional reason that the insured left at least one brother and one or more half-brothers who may assert a claim to such insurance as against both Mr. and Mrs. Hoth and Mr. Whitman. As a matter of fact one of the brothers has heretofore filed formal claim for the insurance with the Veterans Administration. It is, of course, entirely possible that if the matter is placed before the courts, all other claimants having a possible interest may file disclaimers and permit the entry of a judgment by stipulation in favor of Mr. Whitman, as the person who last bore the relationship of a father to the insured, and Mrs.

Hoth as the person who last bore the relationship of a mother to the insured.

It is believed that the above answers the inquiries made by Mr. Bushnell, but in the event that you desire additional information we shall be glad to communicate with you further.

Very truly yours,

EDWARD E. ODOM,
Solicitor.

DCB/wab

[Endorsed]: Filed December 14, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William E. Hoth and Rose E. Hoth, plaintiffs, and to Raymond A. Reiser, their attorney; and to Guy F. Whitman, plaintiff, and to Donald M. Bushnell, his attorney:

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in the above court on the 11th day of December, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ KENNETH J. SELANDER,
Assistant United States Attorney.

[Endorsed]: Filed February 5, 1952.

DEFENDANTS' EXHIBIT A-1

United States District Court, Western District of Washington, Northern Division

Civil Action No. 2735

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM E. HOTH, et al.,

Defendants.

STIPULATION OF COMPROMISE AND SETTLEMENT

Comes Now the plaintiff, United States of America, by its attorney, ...; William E. Hoth and Rose E. Hoth, defendants herein, by their attorney Raymond A. Reiser, and Guy F. Whitman, defendant herein, by his attorney, Donald M. Bushnell and stipulate, in compromise and settlement as follows:

Whereas no appearance has been entered by any party to the above-entitled action other than the above-named defendants and an order of default has been or will be entered herein prior to entry of judgment;

Whereas the above-named defendants are aged and distant from the place of trial;

Whereas each of the above-named defendants believe that there is merit to the claim of the other to the proceeds of insurance in question herein and that each stood in the relation of loco parentis to

the deceased for more than one year prior to his demise;

Whereas the plaintiff disclaims any interest in the remaining balance of the proceeds of a contract of National Service Life Insurance (identified by Certificate No. N-11 661 432) and stands ready and willing to pay any and all further sums of money due under said policy to the person or persons lawfully entitled thereto;

Whereas the only remaining claimants herein have resolved their differences and are ready, willing and able to compromise and settle the same under the provisions of Title 38, Section 445, (b), U.S.C.A., and in accordance with the policy of the law to encourage compromise and settlements.

Now, Therefore, It Is Stipulated and Agreed as Follows:

1. That at the time of the death of John M. Donley, insured, and for a period of more than one year prior to his death, Guy F. Whitman, stepfather; William E. Hoth, uncle, and Rose E. Hoth, aunt, all last stood in the relation of loco parentis to the deceased and are equally entitled to share the remaining proceeds of National Service Life Insurance issued by the United States of America to the deceased.

2. That in the event any of the above-named parties die prior to the time the entire proceeds of said insurance have been fully paid, then, and in that event, the remaining sum shall be paid to the survivor or survivors, share and share alike.

3. That the findings of fact and conclusions of law hereto attached are approved as to form and incorporated herein by reference as though more fully set forth herein.

4. That 1/10th of the proceeds of insurance awarded to each of the above-named claimants is a reasonable sum to be awarded his or her attorney as attorney's fees herein.

....., RAYMOND A. REISER, Attorney for William E. Hoth and Rose E. Hoth.

....., DONALD M. BUSHNELL, Attorney for Guy F. Whitman.

....., Attorney for the United States, Plaintiff.

It Is So Ordered This .. day of ..... 19...

....., Judge.

I, Rose E. Hoth, defendant and claimant herein, do hereby consent to the entry into the stipulation on the reverse side hereof by my attorney, Raymond A. Reiser, and to hereby ratify and confirm his act, this 19th day of November, 1951.

/s/ MRS. ROSE HOTH, Defendant.

Greeley, Colo.
Aug. 20th, 1951,

Mr. Raymond A. Reiser,

Dear Sir:

I have just recd. the inclosed letter from Mr. Whitman.

I feel it up to you as to what to do about it. You have all the facts and should know more about it than I do.

Maybe this letter is the truth, maybe not, you should know.

Pleas let me know how things are coming.

Yours Respt.,

/s/ W. E. HOTH,
715-5th St.,
Greeley, Colo.

Greeley, Colo.
Aug. 25, 1951,

Mr. Reiser,

Dear Sir:

I have your letter of the 22nd.

What does a 3-way split amount to in dollars and cents and to whome? Pleas state fully.

As to your other question, I raised 4 other boys besides John. There were times I had to kick the seat of their pants to get them to understand what was right and what was wrong. They all grew up to be honorable men. Thar wer no fights. I shure have been ast some of D.s fool qustins. About as bade as Joy and Ridgway over in Korea. Am getting no place. It has been 8 years since John was killed. No settlement. If this goes to trial I well there.

/s/ W. E. HOTH.

Mr Raymond A Reiser

Dear Sir in regard to the John M. Donley estate or insurance i hardly know how to answer as i have tried so many times to explain and none of them seem to be what you need

A Mrs Ruby Preuit. Wheatland wyo Route
Mrs. Mary Gorwood Dwyer wyo

B. No Guy whitman nor none of the family wrote or sent cards on no presents dident show any interest as if they had ever known the boys were alive

C. yes John & struck Mr. Hoth he had showed him how to put wood in the saw so he would not brake the saw as they were sawing wood for the house Mr Hoth dident strike him to any knowing it did cut Mr. Hoths life till he had to have the Dr sew it Mr Hoth said then i should have something done with him and then after thinking it over he said no i will not do it and as Mr Hoth was gone quit a bit at the time it was hard for it was at the place where we seldom ask any thing of him for he would brake or destroy whatever he worked with and would throw clubs or any thing at his Bro & i feared to have them out together doing chores and i think it was I & not Mr. Hoth that told him that as long as he

did not want to help & get along i was not able to support & do for him and to try to find a steady job he went to cosper in a few days & went out with a sheepman & i had a card from him they were trailing sheep to Baggs Colo & later to vernal utah had several cards & letters through the summer

D. as long as both boys were with me they both roomed togather but when John was home last Paul had finished School & was in C CC camp about 17 mi came home over Sunday most of the time i was alone mutch of the time so there was a seperate room for John at that time be he seemed to feel he shouldent do eny thing for eny one after he had staid till dident have even tobacco money Paul gave him money & i got him eny day Does to go back to Bragg Colo on a job he said he had but couldent get to it i heard from him a card there then when i had another card he was with a truck driver way in the south.

E. i do not think i have eny thing left

F. no Will Donley or his wife is not living Their Daughter was a teacher at the time the boys were in the home Mrs. Blair Ingalsbe. Donville Ill. a w 3

is her address and as there were the two grown girls in the home they can tell you the condition of the boys & their clothing when their father brought them to their home

~~Q~~ E. W. I Sutherland is Sheriff of Platt Co

G. no i have no income to for

H. all but the first year school they were with me I had moved to town to help my daughter in high school in winter but decided it would be better for the boys & for me on the ranch and boarded the daughter in town.

well i think i have explained this as fully as i can & i hope it will be satisfactory i will also send you whitmans letter to me how he can say Johan & Paul were with him i dont know for he moved into the home that had been provided for them and they had plenty to keep them and he and their Mother started the whitman family in their home i cant see where he has any claim for any thing but it seems there is isent much but trouble in this world any way i will try and answer any other questions i can & hope it can be settled

Resp Mrs Rose Hoth

1383. Wheatland wyo

ADMITTED IN EVIDENCE DECEMBER 11, 1951

DEFENDANTS' EXHIBIT A-2

[Exhibit A-2 consists of a Stipulation identical in form with the Stipulation in Exhibit A-1 set forth at page 65 with the following consent endorsed thereon.]

I, William E. Hoth, defendant and claimant herein, having read the stipulation on the reverse side hereof due hereby ratify and confirm the act of my attorney in entering the same in this action. Dated this 27th day of November, 1951, at Greeley, Colo.

/s/ WILLIAM E. HOTH,
Defendant.

Greeley, Colo.
Aug. 27, 1951.

Mr. Reiser, Dear Sir:

Pleas find inclosed another one from Whitman. I don't understand the division of 4,000 3 ways and him get the balance. I think the division of the full amount of insurance now due looks fair, ⅓ to Whitman, ⅓ to Mrs. Hoth and ⅓ to me. I think we would be willing to settle on that basis.

/s/ W. E. HOTH.

P.S. I am not writing to Whitman. That up to you.

Admitted December 11, 1951.

DEFENDANTS' EXHIBIT A-3

[Exhibit A-3 consists of a Stipulation identical in form with the Stipulation in Exhibit A-1 set forth at page 65 with the following consent endorsed thereon.]

I, Guy F. Whitman, defendant and claimant herein, having read the stipulation on the reverse side hereof, do hereby consent thereto and ratify and approve the entry thereof by my attorney Donald M. Bushnell this 27th day of November, 1951.

/s/ GUY F. WHITMAN,
Defendant.

Admitted December 11, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure and I am transmitting herewith all of the original papers in the file dealing with the

above-entitled action, and that the same constitute the complete record on file in said cause and the record on appeal from the Judgment entered in said cause on December 12, 1951, and filed on December 11, 1951, to the United States Court of Appeals at San Francisco, California, said documents being identified as follows:

1. Complaint in the Nature of a Bill of Interpleader, filed March 8, 1951.
2. Praecipe for Summons, filed March 8, 1951.
3. Order for Issuance of Summons, filed March 12, 1951.
4. Marshal's return on Summons, filed March 14, 1951. (Unserved.)
5. Marshal's return on Summons (Mrs. Rose E. Hoth), filed March 19, 1951.
6. Marshal's return on Summons (Guy E. Whitman), filed March 27, 1951.
7. Copy of Summons as issued under order of March 12, 1951, filed 3-27-51.
8. Marshal's return on Summons (Philip K. Whitman), filed 3-27-51.
9. Marshal's return on Summons (David A. Whitman), filed 3-28-51.
10. Marshal's return on Summons (Paul Donley), filed 3-30-51.
11. Marshal's return on Summons (William E. Hoth), filed 3-30-51.
12. Appearance of Raymond A. Reiser for defts. William N. and Rose R. Hoth, filed 5-8-51.
13. Appearance of Donald M. Bushnell for Guy F. Whitman, filed 5-15-51.

14. Answer to Interpleader and Statement of Claim by Guy F. Whitman, filed 5-15-51.

15. Answer to Bill of Interpleader and Statement of Claim by Rose E. and William E. Hoth, filed 6-1-51.

16. Affidavit of William E. Hoth, et ux, in Resistance to Motion for Change of Situs of Trial, filed 6-12-51.

17. Motion of Guy F. Whitman to hold trial in Bellingham, filed 6-12-51.

18. Interrogatories of Rose Hoth, and William E. Hoth to Guy F. Whitman, filed 6-28-51.

19. Answers of Guy F. Whitman to interrogatories of William E. Hoth and Rose Hoth, filed 6-28-51.

20. Note for Motion docket, filed 7-31-51, re Motion to hold trial at Bellingham.

21. Withdrawal of Motion of Guy F. Whitman to hold trial at Bellingham, filed 8-3-51.

22. Motion of Plaintiff for default against defendants Philip K. Whitman, David A. Whitman and Paul Donley, filed 11-16-51.

23. Order of Default, filed 11-16-51.

24. Findings of Fact and Conclusions of Law, filed 12-11-51.

25. Judgment, filed Dec. 11, 1951, and entered in civil docket 12-12-51.

26. Stipulation of Compromise and Settlement filed 12-11-51.

27. Copy of letter dated 10-5-51 from Attorney General to U. S. Attorney, filed 12-14-51.

28. Copy of letter dated 6-23-50 from Edward

E. Odom, solicitor to Hon. Henry M. Jackson, M. C., filed 12-14-51.

29. Notice of Appeal, filed Feb. 5, 1952.

Defendants' Exhibits A-1, A-2 and A-3.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiff, to wit: Notice of Appeal, $5.00, and that this amount has not been paid to me by attorneys for appellant for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 12th day of March, 1952.

[Seal] MILLARD P. THOMAS,
Clerk;
By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13294. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William E. Hoth, Rose E. Hoth and Guy F. Whitman, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 14, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13294

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM E. HOTH, ROSE E. HOTH and GUY F. WHITMAN,
Appellees.

POINTS TO BE RELIED UPON ON APPEAL

Comes now the appellant, United States of America, and states that the following points will be relied upon on appeal in the above-entitled cause:

1. That the Court erred in finding, since there was no evidence before it, that Rose E. Hoth ever stood in the relationship of loco parentis to the insured for a period of at least one year prior to his entry into the armed services of the United States.

2. That the Court erred in finding since there was no evidence before it, that Rose E. Hoth last bore the relationship of loco parentis to the insured for a period of at least one year prior to the entry of the insured into the armed services of the United States.

3. That the Court erred in finding, since there was no evidence before it, that there were two paternal parents who last stood in the position of loco parentis to the insured for a period of at least one year prior to his entry into the armed services of the United States.

4. That the Court erred in finding, since there was no evidence before it, that William E. Hoth

ever stood in the relationship of loco parentis to the insured for a period of at least one year prior to his entry into the armed services of the United States.

5. That the Court erred in finding, since there was no evidence before it, that William E. Hoth last bore the relationship of loco parentis to the insured for a period of at least one year prior to the entry of the insured into the armed services of the United States.

6. That the Court erred in finding, since there was no evidence before it, that Guy F. Whitman ever stood in the relationship of loco parentis to the insured for a period of at least one year prior to his entry into the armed services of the United States.

7. That the Court erred in finding, since there was no evidence before it, that Guy F. Whitman last bore the relationship of loco parentis to the insured for a period of at least one year prior to the entry of the insured into the armed services of the United States.

8. That the Court erred in finding for the defendants, Rose E. Hoth, William E. Hoth and Guy F. Whitman.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ KENNETH J. SELANDER,
Assistant United States
Attorney.

[Endorsed]: Filed March 17, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes now the appellant, United States of America, and designates the following as the record to be prepared on appeal in the above-entitled cause:

1. The entire record as transmitted by the Clerk, United States District Court, Western District of Washington;

2. Points to be Relied Upon on Appeal; and

3. This Designation of Record.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ KENNETH J. SELANDER,
Assistant United States
Attorney.

[Endorsed]: Filed March 21, 1952.

No. 13298.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

WALTER S. BINNS,
United States Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief, Criminal Division,

JAMES K. MITSUMORI,
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Attorneys for Appellee.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

This appeal is taken from an Order denying appellant's motion made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, namely, to set aside a Judgment of Conviction and permit appellant to withdraw his plea of guilty. This Order was entered on December 8, 1951, by the District Court of the United States in and for the Southern District of California in case No. 19946 Criminal [Tr. 7].[1] The District Court had jurisdiction to entertain the Motion under Title 18 U. S. C. Sections 3231, 3234, Rule 20 and Rule 32(d), Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to Rule 37(a), Federal Rules of Criminal Procedure, Title 28 U. S. C. Section 1291.

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[1]References to the Transcript on Appeal are designated "Tr. ....." in this brief.

Questions Presented.

Is it a Federal offense under Section 408, Title 18, United States Code (1946 Edition) to transport across state lines an automobile fraudulently purchased by means of a worthless check?

Appellee respectfully submits that if the answer to this issue is answered in the affirmative, then there is no need to answer the second question raised by appellant; and if the answer is in the negative, then appellee has no objection to permitting appellant to withdraw his plea of guilty.

Material Facts.[2]

The facts, for the purpose of this appeal, have been agreed upon by the parties hereto, and the facts as set forth in appellant's Opening Brief are correctly stated.

Statutes and Regulations Involved.

(A) The Penal Statute.

Section 408 of Title 18, United States Code (1946 Edition), known also as the Dyer Act, provides:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."[3]

---

[2]The Agreed Statement on Appeal [Tr. 2-5] is supplemented by reference to the transcript in case No. 12478 of this Court which was filed in an earlier appeal in this case. It has been stipulated by the parties hereto that reference may be made to said Transcript on this appeal [Tr. 10-11].

[3]Immaterial portions of the statute have been omitted.

(B) The Rule Under Which the Appellant Filed His Motion to Set Aside a Judgment of Conviction and Withdraw His Plea of Guilty in the District Court.

Rule 32(d) of the Federal Rules of Criminal Procedure:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Summary of Argument.

The argument of the Government will be confined to the question of whether or not a motor vehicle which has been obtained by means of fraud or false pretenses is "stolen" within the meaning of Section 408 of Title 18, United States Code (1946 Ed.).

ARGUMENT.

A Motor Vehicle Which Has Been Obtained by Means of Fraud or False Pretenses Is "Stolen" Within the Meaning of Section 408 of Title 18, United States Code.

At the time of sentence, the Court below was acquainted with appellant's activities in connection with the offense with which he was charged [Tr. 23, lines 14-18]. Likewise, at the time the Court made the Order denying appellant's motion made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, the Court was fully aware of the method by which appellant had obtained his illegal possession of the motor vehicle.

The appellant's argument was then, and is now, principally based on the authority *Hite v. United States* (C. C. A. 10, 1948), 165 F. 2d 973. It must be assumed that the Court below rejected this authority in denying the appellant's motion. It is appellant's argument that he obtained both possession and title to the automobile by giving a worthless check, that there was thus no common law larceny, and hence, the automobile transported across state lines was not "stolen" within the meaning of Section 408 of Title 18, United States Code. There are authorities which cast serious doubt upon the correctness of the ruling of the *Hite* case and other cases cited by appellant following the *Hite* case.

In the case of *Crabb v. Zerbst* (C. C. A. 5, 1938), 99 F. 2d 562, the Court had occasion to define the word "steal" as it appeared in Title 18, United States Code,

Section 100.[4] In answering the defendant's contention that "to steal" was "to commit larceny" the Court said:

> " 'Steal' and 'purloin' are not synonymous, though used in dictionaries in defining larceny and in defining each other; and 'steal,' *having no common law definition* to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to 'purloin.' " (Emphasis added.)

In *United States v. Handler* (C. C. A. 2, 1944), 142 F. 2d 351, the defendant insisted that the word "steal" was synonymous with the act of common law larceny. The statute under consideration was the National Stolen Property Act [Sec. 415, Tit. 18, U. S. C. (1946 Ed.)],[5] and the controversy had to do with the meaning of the phrase "with intent to steal and purloin." At page 353, the Court said:

> "But we cannot accept the appellant's argument that a taking with intent to steal is synonymous with technical larceny. In various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law. See *United*

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[4]Section 100 (Criminal Code, Section 47) "Embezzling public moneys or other property. Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or other valuable thing whatever, of the moneys, goods, chattels * * *."

[5]"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities or money, of the value of $5,000 or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin. . . ."

States v. Trosper, 127 Fed. 426, 477, 'steal' from the mail; *United States v. Adcock,* 49 Fed. Supp. 351, 353, interstate transportation of 'stolen' automobile. . . ."

See also:

United States v. De Normand et al. (C. C. A. 2, 1945), 149 F. 2d 622—"Steal" from interstate shipment of freight.

In *United States v. Adcock,* 49 Fed. Supp. 351 (D. C. W. D. Ky., 1943), which was cited with approval by the United States Court of Appeals for the Second Circuit, in *United States v. Handler* (C. C. A. 2, 1944), 142 F. 2d 351, cited *supra,* the Court held that the word "stolen," as used in Section 408, was broad enough to include embezzlement. The owner loaned his automobile to a former employee to go to a nearby town. The employee made his planned journey and then decided to keep the automobile. He subsequently drove the car over several state lines, and was finally indicted for violation of Section 408, Title 18, United States Code, the National Motor Vehicle Theft Act. Under no theory could the employee be said to have committed larceny by the taking, for the machine was in his sole possession, rightfully, at the time of his criminal conversion of it. It was an embezzlement of the automobile. The Court, in defining the word "stolen" as it appeared in the statute, said:

> "I am of the opinion that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in the well known and accepted meaning of *taking the personal property of another for one's own use without right or law,* and that such a taking can exist whenever the intent to do

so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it." (Emphasis added.)

The ruling in the *Adcock* case, *supra,* was followed by the United States Court of Appeals for the Sixth Circuit in *Davilman v. United States* (C. C. A. 6, 1950), 180 F. 2d 284. In this case, which was brought under the Dyer Act (18 U. S. C., Sec. 408), the defendant and his wife rented an automobile in Las Vegas, Nevada, and later transported it to Kentucky. There was evidence that they had decided to appropriate the car for their own use. On a subsequent Motion to vacate judgment of conviction and sentence, the defendants urged that even though the automobile had been appropriated, they could not be punished under the Dyer Act because the original taking was with the consent of the owner. The Court denied the motion and the Order was affirmed on appeal. The appellate court held that defendants' conduct constituted the interstate transportation of a "stolen" motor vehicle within the meaning of the Dyer Act.

In *United States v. Sicurella et al.* (C. C. A. 2, 1951), 187 F. 2d 533, defendants had the permission of the owner to use his car at any time, even on long trips. The car was driven to another state by the defendants for the purpose of sale to a dealer. The defendants did not have permission to sell the car, and were indicted and convicted for violation of the Dyer Act (Sec. 2312 of Tit. 18, U. S. C. (1950 Ed.)). Defendants contended on appeal that since they had obtained possession of the car with the owner's consent, the car was not "stolen" within the meaning of the Dyer Act. Judge Augustus N. Hand,

speaking for the Court, rejected this contention, on page 534:

> "Defendants say that a conviction under the Dyer Act cannot stand unless there is evidence sufficient to prove larceny under the narrowest definition of that crime at common law. *Such a contention would not help the defendants even if it were sound—which we do not intend to intimate—for a narrow common law definition is not required under the Dyer Act.* . . ." (Emphasis added.)

The construction given to the Dyer Act by the Courts of Appeals for the Second and Sixth Circuits is consistent with reason and logic, and would appear to be in accord with what must have been the objective sought to be achieved by Congress in the enactment of this and related federal statutes. The ruling of the *Hite* case, narrowly limiting the operation of the National Stolen Vehicle Act to the interstate transportation of motor vehicles acquired only by common law larceny is neither required by the statute nor designed to halt the interstate traffic in illegally obtained motor vehicles.

In the Dyer Act and in the various other federal statutes punishing the interstate transportation of stolen property, Congress has not defined the words "stolen" or "steal." There is nothing in these statutes to suggest that the meaning of these terms was to be restricted to the common law definition of larceny. It would appear plain that in seeking to reach and punish conduct which is largely beyond the reach of local law enforcement, the scope of the statute would extend to any unlawful taking of personal property, whether such taking be by larceny, embezzlement, fraud, or false pretenses. There is no discernible reason for distinguishing between those who

obtain possession of property by any of these methods. All such means of illegally acquiring possession of property of another are plainly offenses of equal gravity, and are equally difficult to reach by local law enforcement when such property is moved across state lines.

It is submitted that the interpretation given to the word "stolen" as it appears in the Dyer Act by the Courts of Appeals for the Second and Sixth Circuits—and by the Court below—is the interpretation which gives the full effect to this important statute which Congress must have intended, is both reasonable and logical, and deprives no one of any rights, substantial, or otherwise, nor leads to any injustice. Under this interpretation all who transport stolen property across state lines, however such property was stolen, whether by larceny, by fraud or by false pretenses, since they come equally within the scope of the evil sought to be eradicated, come equally within the scope and operation of the statute, and are equally subject to its terms.

For the foregoing reasons the order of the Court below denying Appellant's motion should be affirmed.

Respectfully submitted,

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RAY H. KINNISON,
Assistant U. S. Attorney,
Chief, Criminal Division,
JAMES K. MITSUMORI,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 13,300

IN THE

United States Court of Appeals

For the Ninth Circuit

VELMA L. SHELLEY,
Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and ALASKA SALES & SERVICE, INC., a corporation,
Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

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No. 13,300

IN THE

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UNION OIL COMPANY OF CALIFORNIA, a corporation, and ALASKA SALES & SERVICE, INC., a corporation,
Appellees.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken by appellant (plaintiff in the lower Court) from a final judgment rendered on the 27th day of November, 1951, by the District Court for the Territory of Alaska, Third Division, in favor of the appellees (defendants in the lower Court) and against the appellant. Appellant, in her brief (page 1) inadvertently has stated that this is an appeal from

the District Court for the Territory of Alaska, *Fourth* Division.

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four divisions, of which the Third Division is one. Jurisdiction of the District Court is conferred by Title 48 U. S. Code, Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-1-1. Practice or procedure in the District Court, since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the Courts of the Territory of Alaska on that date. 63 Stat. 445, 48 U.S.C. 103A.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new Title 28, U.S.C., Sections 1291 and 1294, and is governed by the Federal Rules of Civil Procedure.

Appellees accepted the statement of appellant in her brief as to the pleadings in the case. Contributory negligence of the plaintiff was not affirmatively pleaded in the answers of either defendant. The original pleadings are before this Court for its use.

This matter was tried by the District Court, with a jury, between the 20th day of September, 1951, and the 28th day of September, 1951. On the latter date the jury returned a verdict in favor of both defendants and against the plaintiff. (Transcript 465.)

During the course of the trial certain evidence was admitted from which the jury might properly have inferred that plaintiff's fall and any resulting injuries to the plaintiff were the direct and proximate

result of her own negligence, or that such fall and any resulting injuries were the result of contributory negligence or concurring negligence of the plaintiff. This evidence was given by witnesses called by the plaintiff as will be shown in the following argument. No evidence bearing on contributory negligence was offered by either defendant. No protest or objection was made by the plaintiff or on her behalf concerning the evidence received from which contributory negligence might appear. At the close of the trial the Court instructed the jury on the law of the case including various instructions upon issues as to the question of plaintiff's negligence or contributory negligence, which as above mentioned had arisen by reason of evidence adduced from plaintiff's witnesses and issues which appellees claim were before the Court by common consent of all the parties.

During the course of the trial plaintiff presented to the Court her offered instructions, including offered instruction number one having to do with the question of negligence of the plaintiff. Plaintiff's offered instruction numbered one reads as follows:

> "Plaintiff's offered Instruction No. 1.
>
> You are instructed that the allegations of the defendants to the effect that plaintiff was negligent and that her negligence caused the injuries, must be proved by the defendant or defendants alleging the same, and that these are affirmative defenses, and that the same degree of burden of proof is upon the defendant to prove the plaintiff's negligence to be the cause of the accident,

> as there is upon the plaintiff to prove the negligence of the defendant; therefore, if you find the weight of the evidence is equally balanced or preponderate in favor of the plaintiff, then the defendants have not proved their allegations and your findings should be against such allegations."

Plaintiff excepted to the failure of the Court to give her offered instructions, including number one above quoted, on the specific ground that the offered instructions *"clearly state the law in the case"*. (Transcript 459.) (Emphasis supplied.)

Plaintiff through her attorney excepted to the giving of instruction numbered six as given by the Court and having to do with contributory negligence. This instruction is set out in full in appellant's brief (page 3) as well as in the copy of the Court's instructions which is before the Court. The plaintiff's exception to such instruction was taken on the specific ground that contributory negligence had not been pleaded. (Transcript 459.) No objection was made or exception taken on behalf of the plaintiff as to any other instruction or part or portion of instruction as given by the Court and no objection was made or exception taken to the content of instruction number six, as given by the Court, or of any claimed error in law in the instruction as given except the claim that the instruction was not within the scope of the pleadings. (Transcript 459 and 463.)

On October 2, 1951, plaintiff filed her motion for a new trial. Such motion in paragraph III thereof

claimed that the trial Court had erred in giving instruction numbered six "for the reason that there was no adequate plea of contributory negligence". Paragraph IV of the motion for new trial claimed that "the Court erred in giving instruction on independent contractor as there was *no* a sufficient allegation in the answer to justify such instruction". The latter proposition had not been previously raised either by objection or exception, or otherwise.

None of the pleadings were taken by the jury to the jury room. (Transcript 437-438.)

Defendants on October 24, 1951, moved to be allowed to amend their answers to specifically allege contributory negligence of the plaintiff in order to conform to the proof and on the ground that such issue had been raised by evidence presented by the plaintiff without objection of the defendants, and that such issue had been tried by common consent of all the parties during the course of the trial in the District Court. Copies of proposed amended answers were filed by each of the defendants and served with the motions. The motions and the amended answers are before this Court.

Argument was had to the Court on plaintiff's motion for new trial and on defendants' motions to amend their answers, as above set forth, and upon plaintiff's objections to such motions. The trial Court, on November 23, 1951, overruled the motion for new trial and granted the separate motions of the defendants to be allowed to amend their answers.

Judgment was thereupon entered in favor of the defendants and against the plaintiff in accordance with the jury verdict. This appeal followed.

II.

SUMMARY OF ARGUMENT.

Appellant has claimed that the District Court erred in instructing the jury upon contributory negligence when contributory negligence was not affirmatively pleaded in the answers. Appellant also claimed that the trial Court erred in denying plaintiff's motion for a new trial and allowing defendants to file amended answers to plead contributory negligence after the verdict. In her brief appellant also claims that the Court erred in giving certain other instructions.

Appellees believe that the only questions for consideration by the Court are as to the propriety of the trial Court giving an instruction on contributory negligence and as to whether appellant has shown any prejudice by reason of the rulings of the trial Court.

Appellees believe that on the face of the record that defendants' separate motions for dismissal of the action and for judgment for the defendants as made at the close of the plaintiff's case and as renewed at the end of the trial, should have been granted and for that reason appellant could not have been prejudiced in any manner by the giving of the instruction to which she excepted.

It affirmatively appears in this action that evidence was produced by the plaintiff herself from which the jury might properly have inferred that the plaintiff's own negligence was the direct and proximate cause of her fall and of her resulting injuries. Accordingly the issue of contributory negligence was properly before the Court without any affirmative plea of contributory negligence in the answers. For that reason the Court properly instructed on the issue of contributory negligence and the giving of an instruction on that theory was not error and the plaintiff was not prejudiced thereby.

Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such rule further provides that such amendment to the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend will not affect the result of the trial of these issues. In this case the issue of contributory negligence was not raised by the pleadings but was tried by implied consent of all the parties on evidence introduced by appellant herself and the Court properly treated such issue as being before the Court as if it had been raised by the pleadings. This Court and other Courts of Appeal and the Federal District Courts in interpreting Rule 15(b) have held that issues not raised by the plead-

ings but tried by express or implied consent of the parties are to be considered as a part of the case even though not pleaded.

Under the provisions of Rule 15(b) an amendment of the answers was not required but likewise under such rule the Court had full power to allow amendment of the pleadings after verdict as was done in this case. The Court did not abuse its discretion in allowing such amendment and the plaintiff was not prejudiced by such ruling.

By the terms of Rule 61 of the Federal Rules of Civil Procedure no error or defect in any ruling or order, or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict, or for vacating, modifying or otherwise disturbing the judgment or order unless refusal to take such action appears to the Court inconsistent with substantial justice. By the same rule the Court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. Appellant here has not shown that she was prejudiced in any way by failure of defendants to plead contributory negligence. She was not surprised. She introduced the evidence in question. She herself requested an instruction on contributory negligence and excepted to the failure of the Court to give the requested instruction. The error, if error it was, in the failure of defendants to affirmatively plead the issue of contributory negligence was

merely technical. It did not affect the substantial rights of any of the parties and it did not prejudice the plaintiff. The Court properly disregarded such error or defect in the proceedings. The action taken by the District Court is not in any way inconsistent with substantial justice and the appellant has shown no reason why the judgment of the District Court should be reversed.

III.

ARGUMENT.

Appellees believe that appellant's "statement of points" raise three questions of law as follows:

(1) Points numbered one and five claim that the trial Court erred in giving instruction numbered six having to do with contributory negligence. Point number one is limited to a claim that the instruction was given in error solely on the ground that contributory negligence was not pleaded in the answers. Point number five claims that the Court erred in giving instruction number six because contributory negligence was not pleaded in the answers and in addition claims that the instruction as given was defective for various other reasons.

(2) Points numbered three and four claim that the Court erred in permitting defendants to file amended answers after the verdict of the jury.

(3) Point numbered two claims that the Court erred in giving an instruction on "independent con-

tractor", on the ground that "there was no sufficient allegation in the answer and no evidence admitted except over objections of plaintiff to justify an instruction thereon".

In her opening brief appellant, by inference at least, objects to portions of instruction numbered five, seven and eight, in addition to the objection previously made to instruction numbered six, under a claim that, in the words of appellant's brief (page 8) that "the Court by said instructions over emphasized this affirmative defense of contributory negligence even though it was never pleaded nor proved".

Since no timely objection was made or exception taken in the trial Court to any instruction or portion of instruction given by the trial Court except as to instruction numbered six, and since the only objection to instruction numbered six made in the trial Court was that such instruction was "not within the pleadings, because there is no plea of contributory negligence in the answer" (Transcript page 459), appellees believe that the important question before this Court is as to whether failure of the defendants to plead contributory negligence in their respective answers precluded the Court from instructing on contributory negligence.

A corollary question is as to whether plaintiff was prejudiced in any manner by the fact that defendants' respective answers did not affirmatively plead the defense of contributory negligence of the plaintiff. If either of those questions is resolved against

the appellant then it would appear that defendants' respective motions to file amended answers and the action of the Court in granting such motions need not be considered by this Court.

Since appellant at the trial did not raise any objection or take any exception to the instruction as given by the trial Court concerning the doctrine of independent contractor or to the contents of or the correctness of the law stated in instruction numbered six as given by the Court and since no citations to either case or statute law were made or any argument had concerning such propositions in appellant's opening brief, appellees will treat such points as not being properly before this Court or as having been abandoned by appellant. Appellees will confine their argument to the propriety of the District Court instructing concerning contributory negligence when that defense had not been affirmatively pleaded by defendants and to the question as to whether or not the plaintiff has shown that she was prejudiced in any manner by the giving of the instruction in question when contributory negligence had not been pleaded.

Appellees will likewise discuss the action taken by the trial Court in granting the motions of the respective defendants to amend their answers after verdict.

At the outset appellees wish to point out that at the close of plaintiff's case each of the defendants moved for dismissal of the action and for judgment in favor of the respective defendants on the ground that the plaintiff had failed to prove her case as against either of the defendants. (Transcript 351-

352.) These motions were denied by the trial Court at that time. Each of such motions were renewed by both defendants at the close of all of the evidence and the motions were again denied by the trial Court. (Transcript 452.)

Appellees respectfully wish to call the attention of this Court to the fact that the record does not disclose a shred of evidence before the Court at the close of plaintiff's case from which the jury could properly deduce that either of the defendants had been guilty of any negligence. Appellees further respectfully suggest to this Court that at the close of plaintiff's case there was no substantial evidence at all before the Court from which the jury might properly have inferred that plaintiff's fall and her resulting damages were the proximate result of any negligence or carelessness of the defendants, or of either of them. The record in this case is unique in that there is no direct evidence in the record to the time when plaintiff closed her case to the effect that either of the defendants delivered any oil to the premises in question on the day in question, or that any oil was spilled by either of the defendants, or that if any oil was spilled that such spilling involved any negligence on the part of either defendant. Likewise there was no evidence at all before the Court at the close of plaintiff's case to indicate that the defendants had not cleaned up any oil which may have been spilled or which may have "blown back" without fault of the defendants, or of either of them.

The only evidence concerning delivery of oil on the day in question was by the witness Rodin who testified that the oil had been delivered by Union Oil Company. On cross-examination he admitted that he had not seen any oil delivered and knew nothing about it, and that he was merely speculating that it must have been delivered by the Union Oil Company. In that connection see transcript beginning at page six on direct examination of Mr. Rodin where the following questions and answers are recorded:

> "Q. And on that particular morning did you see a delivery or know of a delivery of oil having been made there at the premises?
>
> A. Well, not at that time I didn't, but I noticed when I come out that there was oil spilled all over the back steps there so that the oil company had been there filling up the oil tanks.
>
> Q. Now, do you know what company made the deliveries there regularly?
>
> A. The Union Oil Company * * *
>
> Q. Where were you that morning, Mr. Rodin?
>
> A. I was in my sleeping quarters just right behind there just two or three feet from the downstairs steps."

See also transcript beginning at page 8 where the following questions and answers are recorded:

> "Q. Now after you dressed and you came out what did you see?
>
> A. There was oil all over the platform and the steps up there so I asked when I got into the kitchen what happened, well the Union Oil Company was there delivering some oil and they spilled oil all over the steps there, so I went in

and I called up the company to come out and clean it up."

See also transcript page 11:

"Q. I see. Well, were they or were they not employees of the Union Oil Company? Or the persons who deliver Union Oil?

A. One of them was the one that delivered the oil, I think he was the one that spilled the oil there on the steps if I am not mistook."

See also transcript, page 13, where the following questions and answers are recorded:

"Q. Would you tell the jury whether or not the truck that delivered oil there had any inscription on the side of it? Any name on it?

Mr. Davis: Your Honor, I think he testified that he didn't see the truck.

A. I didn't see that. I didn't see any on it.

The Court. The objection is sustained."

See also cross-examination of this witness beginning on page 22 of the Transcript where the following questions and answers are recorded:

"Q. You don't know, do you whether the man worked for the Union Oil Company or not, do you?

A. Well, I think he was the one that spilt the oil there on the steps. I don't know, but that is what I understood there.

Q. How did you understand it? Did somebody say so?

A. Somebody was talking there.

Q. Do you know who that somebody was?

A. I don't know who it was.

Q. As a matter of fact, Mr. Rodin, you don't know anything at all about who it was that delivered that oil, do you?

A. No, I wasn't up.

Q. And you actually don't know of your own knowledge who cleaned it up?

A. I know the man that come from the Union and cleaned up after I called up. That is all I know about it.

Q. What you mean, Mr. Rodin, is that you called the Union Oil and then somebody came and cleaned it up. Is that it?

A. Yes.

Q. Alright. Had you done anything at all to try to clean it up in the meantime?

A. No, I didn't. It is not my business to do anything about it."

It would seem from the testimony of all of plaintiff's witnesses that there was considerable oil on the back landing on the morning in question. Some of the witnesses claimed there was also oil on the steps and some that there was oil in the sump at the bottom of the steps. One witness even claimed that the oil was "a good quarter of an inch covered on the platform, cement slab, at that time it was a cement slab outside the door. I think it was about 5 by 8, or something like that. That was covered with it and then the same amount had run down the steps and I could say it was a good quarter of an inch of oil out there". (Testimony of Sigrid Rodin, transcript page 38.) However there is no testimony at all as to how the oil got there, or as to whether one of the tanks had blown

back after the oil truck driver had left or as to whether some third party had put oil there, or how it got there at all. The claim that the oil was spilled or left by either of the defendants was pure speculation, not supported by any evidence whatsoever.

This case is also unique in that there is no direct evidence whatsoever as to the cause of plaintiff's fall. Various witnesses testified as to the fact that plaintiff fell and some of them testified that there was oil on her uniform and on her arm, but appellees feel that it is singular that the plaintiff herself gave no testimony whatsoever as to the cause of her fall. In fact she did not testify that she fell at all. If there was oil on the back of the platform and the steps as testified by plaintiff's witnesses, plaintiff could not have avoided being smeared with oil when she fell, no matter what may have caused her fall and once again it is left purely to conjecture as to whether her fall was caused by her crepe soled shoes or by the unevenness of the steps, or by a mixture of water and salt and an accumulation of grease or by the oil, or by any combination of such factors. One could speculate as to what caused the fall but there is no evidence at all in the record to suggest that the oil caused the fall, or that it was any more likely to have caused the fall than any one of the several other possibilities.

Accordingly, appellees argued to the trial Court, and maintain here, that at the close of plaintiff's case the motions made by the respective defendants should have been granted. If on the entire record it appears, as maintained by appellees, that there was no

substantial evidence to justify a verdict in favor of plaintiff and against defendants, or either of them, at the close of plaintiff's case, then instructions to the jury were not necessary. The case should not have been sent to the jury at all and the question of the propriety of an instruction on contributory negligence is immaterial. If our position is correct, appellant would not be in a position to claim that she was prejudiced by the giving of any of the Court's instructions.

The trial Court, however, did allow the case to go to the jury and did instruct the jury, and if appellees are wrong in their contention that plaintiff failed to prove her case, appellees believe that under the evidence introduced in this case, the question of plaintiff's contributory negligence was properly before the Court, and the Court was justified in giving an instruction on contributory negligence. In fact appellees maintain that the trial Court would have been in error had it refused to instruct the jury on the question of contributory negligence on the state of the record which was before that Court and which is before this Court on this appeal.

According to the testimony of plaintiff's witnesses, there was considerable oil on the landing and possibly on the steps and on the lower landing at the time that plaintiff fell and for some time prior thereto. We call the Court's attention to certain excerpts from the testimony. These excerpts are not meant to be exclusive or to cover the entire testimony, but are

samples of the rather voluminous testimony on that point.

The testimony of Mr. Rodin called as a witness for the plaintiff on his direct examination found on page six of the transcript is as follows:

> "Well, not at that time, I didn't, but I noticed when I come out that there was oil spilled all over the back steps there * * *"

Again on page nine of the transcript, the same witness testified:

> "There was oil all over the platform and the steps up there * * *"

The witness Sigrid Rodin called on behalf of the plaintiff on direct examination testified as found on page 38 of the transcript as follows:

> "Q. Did you then look at the steps?
>
> A. Not then, but I had looked at them previously.
>
> Q. And did you see oil on them?
>
> A. There was oil spilled all over the platform outside the door and down the steps.
>
> Q. Could you give the jury some idea approximately how many gallons of oil appeared to have been spilled there?
>
> A. I couldn't say as far as gallons are concerned, but I think there was a good quarter of an inch covered on the platform, the cement slab, at that time it was a cement slab outside the door. I think it was about five by eight or something like that. That was covered with it and then the same amount had run down the steps, and I could

say it was a good quarter of an inch of oil out there.

Q. And did you notice whether or not this oil had accumulated at the base of the steps?

A. No, I couldn't say that."

The same witness on cross-examination testified as follows, commencing at the bottom of page forty of the transcript:

"Q. You said you had seen the oil previously. How long prior to her fall had you seen the oil on the stairway?

A. It couldn't have been more than fifteen, ten or fifteen minutes or so.

Q. I beg your pardon.

A. It couldn't have been very much more than ten or fifteen minutes, because I came in shortly before that.

Q. You saw the oil as you went from your quarters——

A. Yes.

Q. ——to the kitchen?

A. Yes.

Q. About ten or fifteen minutes before, you surmise?

A. Something like that.

Q. Did you walk through the oil?

A. Yes, I did.

Q. When Mrs. Shelley stated she was going to run downstairs did you tell her to be careful of oil on the landing or stairway?

A. I forget whether I did or not. I know I fussed about the oil being out there. It was awful dirty and tracked in.

Q. That was before she——

A. Before she went down there.

Q. You had fussed about the oil being there?

A. Of course, as I say, I didn't think about the stairway particularly. I was more concerned about the platform because it was tracking into the restaurant.

Q. But you had mentioned the fact or raised a fuss about that oil being there in the kitchen?

A. Yes.

Q. Do you remember if you directed that statement to everyone there or——

A. Oh, not particularly just generally.

Q. Just talking to the other people there?

A. Yes.

Q. Now was the oil there standing there a quarter of an inch thick or was it flowing?

A. It seems to me that it must have been a quarter of an inch because it was very gooey."

The witness Adelle Osborn called on behalf of the plaintiff testified on cross-examination as follows, commencing on page 51 of the transcript:

"Q. You saw a lot of oil out on that cement landing, did you?

A. Oh, yes, yes there was a lot of oil out there.

Q. Very obvious (bovious) it was oil? You could see it was oil?

A. Oh, yes.

Q. You could see that it wasn't water, couldn't you?

A. Oh, yes. You could see it was oil.

Q. Now, did you look down the steps at all?

A. Did I look down the steps?

Q. Yes.

A. No, I didn't have time to look down the steps. I just looked out of the door.

Q. So what you are talking about here is the landing outside the back door?

A. That's right.

Q. And that obviously was covered with a lot of oil?

A. That's right."

The witness Grace Williams called on behalf of the plaintiff on direct examination testified as follows commencing on page 118 of the transcript:

"Q. Did you go to the back door of that kitchen that day and examine to see where she had fallen?

A. Yes, as soon as she said she fell down the steps, because I go out and go down the steps too to the store room——

Q. Yes.

A. ——and it was, as I say, just before the luncheon hour and we were very busy and I dashed out to see what I could see.

Q. What did you see, Miss Williams, when you went out there?

A. Well, I could see it was all covered with oil down on the steps, all the way down there."

The witness Gaylon D. Michael called on behalf of the plaintiff testified on direct examination as follows, commencing on page 127 of the transcript:

"Q. Just in your own words tell the jury about what condition those steps were in.

A. Well, there was oil all over the steps. There was oil down in the bottom. I would say there was at least a half inch or more oil lying in the bottom, which could have consisted of water in the bottom too, but there was oil all over the steps. There was oil all over the front of the steps and the cement block approaching the steps there was oil all over that."

The witness Perry S. McLain called on behalf of the plaintiff on direct examination testified as appears on page 141 of the transcript as follows:

"Q. What did you see there?

A. Considerable oil, especially in that pit at the bottom of the stairs, there was considerable oil in that pit. The bottom landing was offset lower than the floor into the basement of the Legion Building, and there was considerable oil in there and all the way up the stairs there was considerable oil."

From the foregoing testimony, as well as from the other testimony to the same effect, it appears that at the time of plaintiff's fall and for at least fifteen minutes prior thereto and for some time thereafter there was considerable oil on the landing and possibly on the steps and the lower landing as well and that such oil was plainly visible and apparent to anyone who looked in that direction and it appears that there is at least a very strong probability that the plaintiff was warned by Mrs. Rodin or had heard Mrs. Rodin fussing about the oil on the landing, and the mess it caused in the kitchen, prior to the time that

plaintiff started for the basement. It appears clear to appellees that there was a great deal of evidence before the jury from which the jury might properly have inferred that plaintiff saw or, by the reasonable use of her faculties, should have seen the oil before she stepped out onto the landing. It appears that on the evidence introduced by the plaintiff the jury were entitled to consider the question of plaintiff's negligence in stepping into the oil prior to her fall.

On the evidence as presented to the Court it appears to appellees that the Court would have committed prejudicial error had it refused to instruct the jury concerning the issue of plaintiff's own negligence or contributory negligence.

Appellant in her brief has cited numerous cases for the proposition that an instruction on contributory negligence is not justified where that defense is not affirmatively pleaded.

Many jurisdictions consider that the issue of contributory negligence may be raised by a general denial and need not be specifically pleaded.

Assuming, for the purpose of argument, that under the laws of the Territory of Alaska and the practice under the Federal Rules of Civil Procedure contributory negligence must be affirmatively pleaded by the defendant in order for the defendant to introduce evidence in support of that proposition, it doesn't follow that defendant is precluded from taking advantage of evidence introduced by the plaintiff from which contributory negligence might be found by a

jury. Neither does it preclude the Court from instructing the jury concerning contributory negligence or preclude the jury from considering contributory negligence where that issue has been injected into a case by the plaintiff's testimony.

A reading of the cases cited by appellant in her brief will disclose that nearly all of such cases had to do with situations where contributory negligence was not pleaded and no evidence was introduced which raised a question as to contributory negligence or involve situations in which the defendant was precluded from introducing evidence in support of a theory of contributory negligence where that issue had not been raised by the defendant.

At common law and under procedural statutes in "code" states even where the Courts require a defendant to raise the issue of contributory negligence by affirmative pleading the Courts have held that the issue of contributory negligence is properly before the Court where evidence to support that theory was admitted either by the plaintiff's evidence or by the defendant without objection from the plaintiff. As samples of cases supporting such proposition, appellees call the attention of the Court to the following cases:

> *Bogdon v. Los Angeles & Salt Lake Railroad Co.,* 205 Pac. 571, decided by the Supreme Court of Utah in the year 1922.

In that case the plaintiff by his guardian ad litem sued the defendant railroad for personal injuries re-

ceived by the plaintiff when certain blasting powder exploded while he was trying blow up a tin can. Plaintiff claimed that the defendant was negligent in leaving blasting powder in railroad cars.

The answer did not contain a plea of contributory negligence of plaintiff. At the close of plaintiff's case, defendant moved for nonsuit on the ground that plaintiff had not proved any negligence. That motion was denied. The motion for directed verdict was renewed at the close of all the evidence on the ground that there was not sufficient evidence of negligence. That motion was denied. Judgment for the plaintiff was granted. On appeal the Supreme Court reversed the judgment for the plaintiff and held that the lower Court should have given a requested instruction on contributory negligence using the following language:

> "It was, however, only necessary to plead that defense if defendant desired to present affirmative evidence upon that question. It could, however, *without an affirmative plea,* take advantage of evidence produced by the plaintiff, if from a consideration of that evidence it was made to appear that the plaintiff was guilty of contributory negligence which was the proximate couse of the injury."

Later in the opinion the Court uses the following language:

> "That defendant may rely upon plaintiff's evidence in that regard and may move for a nonsuit for a directed verdict upon plaintiff's own evi-

> dence showing contributory negligence, and that he may request the Court to charge upon that question upon such evidence, is fully considered and determined in favor of the proposition by this Court."

and again,

> "The District Court should have given defendant's request, or if it preferred to charge the jury in its own language, it should have done so. Where therefore, there is evidence of contributory negligence, the trial court should not ignore that question merely because there is no affirmative plea of contributory negligence."

The case of *Chicago, Burlington and Quincy Railroad Company v. Cook,* 102 Pac. 657, decided by the Supreme Court of Wyoming in 1909 involved a suit to recover for the loss of certain buggies belonging to the plaintiff and which were burned in a fire near the railroad track. The plaintiff claimed that the fire was set by defendant's locomotive. The evidence introduced on behalf of plaintiff showed that the right-of-way was filled with trash and paper, part of which had been left by the plaintiff in unpacking the buggies. Defendant in its answer did not plead contributory negligence as an affirmative defense. Judgment was given for the plaintiff by the trial Court and was reversed by the Supreme Court which used the following language:

> "The established rule in such cases is that, when a defendant relies on contributory negligence as the defense, he is barred from introducing evidence of such negligence unless he has pleaded it

as a defense. Such plea constitutes an affirmative defense, and the issue must be tendered by him in order to entitle him to introduce evidence in support of such defense. This rule, however, does not bar the defendant from taking advantage of anything in plaintiff's evidence which defeats his right of recovery. In other words the plaintiff must make out a case by the evidence, and, if upon all the evidence, he is not entitled in law to recover the fact may be taken advantage of by the defendant. Although contributory negligence was not pleaded as a defense, yet the undisputed evidence shows plaintiff to have been guilty of contributory negligence which resulted in the loss of her property * * * it was developed by her evidence in making out her case that defeated her right to recovery. Upon the record the Court erred in not granting the motion for directed verdict * * * The Court although requested to do so, refused to instruct the jury upon the question of contributory negligence. Had there been a conflict in the evidence as to whether her acts were excusable or justifiable, it would have been proper to have instructed the jury on that phase of the case."

The case of *J. Maury Dove Co. v. Cook,* 32 Fed. (2d) 957 was decided by the Court of Appeals for the District of Columbia in the year 1929, prior to the adoption of the Rules of Civil Procedure. In that case, the plaintiff walked into the street for the purpose of boarding a street car. Plaintiff admittedly did not look for automobiles before walking into the street. Plaintiff was struck by defendant's truck. The

defendant offered no evidence but asked an instruction on contributory negligence which had not been pleaded. The trial resulted in a verdict and judgment in favor of the plaintiff. That judgment was affirmed on the specific ground that there was a statutory regulation requiring all vehicles to stop when a street car was loading or unloading and accordingly plaintiff was entitled to presume that the defendant would not violate the law. The Court held as a matter of law that the plaintiff was not contributorily negligent. The Court on the question of contributory negligence stated that even though contributory negligence was not pleaded, and even though the defendant was not entitled to introduce evidence of contributory negligence, by reason of its failure to plead such contributory negligence, that the defendant would be entitled to a directed verdict if contributory negligence of the plaintiff were made to appear as a matter of law or was entitled to have the issue of contributory negligence submitted to the jury if the matter of contributory negligence was not decided as a matter of law.

The case of *Mundy v. Davis,* 48 N.W. (2d) 394 was decided by the Supreme Court of Nebraska in the year 1951. That action involved a suit by the plaintiff for injuries received when he was struck by defendant's automobile. Judgment was given for the plaintiff in the lower Court and defendant's motions for new trial and for judgment notwithstanding the verdict were overruled. The Supreme Court reversed the judgment. The trial Court instructed

the jury that the burden was on the defendant to prove contributory negligence and that contributory negligence was the proximate cause or a contributing cause of plaintiff's injuries. The Supreme Court held that if a defendant pleads contributory negligence that the burden is on defendant to prove that defense and that such burden does not shift during the course of the trial. The Court further held that if the evidence adduced by the plaintiff tends to prove the issue of contributory negligence that the defendant is entitled to receive the benefit of that evidence and that the Court must instruct the jury to that effect. The Court further held that from the plaintiff's evidence the jury could properly have found that the plaintiff was contributorily negligent sufficient to defeat or reduce recovery and reversed the case for the reason that the trial Court had not properly submitted to the jury the issue of contributory negligence. The case contains a dissenting opinion on the ground that the trial Court need not instruct on contributory negligence in the absence of a request for an instruction on that point.

Rule 15(b) of the *Federal Rules of Civil Procedure* reads as follows:

> "Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any

> time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would preclude him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

This Court and many of the other of the Courts of Appeals of the United States have had occasion to consider the matter of issues raised by express or implied consent of the parties but outside of the formal pleadings under such rule.

The case of *Balabanoff v. Kellogg,* 118 Fed. (2d) 597, was decided by the Court of Appeals for the Ninth Circuit in the year 1940. This cause arose originally in the District Court for the Territory of Alaska, Third Division and involved an action to enjoin the diversion of certain water. Judgment for the plaintiff was affirmed by this Court. The Court held that in the absence of appropriate attack, the complaint must be held to state a cause of action. There was no objection to the introduction of evidence relative to priorities. No motion was made at the close of the case as to the insufficiency of the pleading. The cause was tried and submitted on the theory that the matter at issue was the relative priorities.

The Court held that no good purpose would be served by sending the case back, and treated the complaint as amended to conform to the proof. On petition for rehearing the Court held that the chief proposition urged was that the Court lacked power to treat the complaint as amended to conform to the proof. The Court cited Rule 15(b) of the Federal Rules of Civil procedure above quoted. The Federal Rules of Civil Procedure had not at that time been made applicable to the Courts of the Territory of Alaska. The Court in ruling held that it need not inquire as to whether the Federal Rules of Civil Procedure were applicable in Alaska and said that the provisions of Rule 15(b) are merely an application of the principle prevailing generally under code pleading and cited Section 3451 of the Compiled Laws of Alaska for 1933 to the effect that no variance shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action on the merits. It also cited Section 3452 of the Compiled Laws of Alaska for 1933 to the effect that when a variance is not material the Court may direct facts to be found according to the evidence or may order an immediate amendment. Also cited was Section 3461 of the Compiled Laws of Alaska for 1933 to the effect that the Court in every stage of a proceeding should disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. These sections are now 55-5-71, 55-5-72 and 55-5-81 respectively of Alaska Compiled Laws Annotated, 1949.

The case of *Rogers v. Union Pacific Railroad,* 145 Fed. (2d) 119, decided by the Court of Appeals for the Ninth Circuit in the year 1944, involved a suit by an employee against the railroad company for wages. Judgment was given to the plaintiff in an amount which was unsatisfactory to him and he appealed. This Court reversed the judgment. Appellant contended that appellee's right to set off overpayments was foreclosed because it was not pleaded. The Court pointed out that the issue of overpayment was expressly raised in the pre-trial order and so was properly before the Court. Moreover the Court said that evidence of overpayment was introduced without objection and the issue was tried by implied consent of the parties that that fact in itself would require the Court to treat it as if raised by the pleadings, citing rule 15(b) of the Federal Rules of Civil Procedure.

The case of *El Paso Electric Co. v. Surrency,* 169 Fed. (2d) 444, decided by the Court of Appeals for the Tenth Circuit in 1948 involved a suit for personal injuries in an automobile accident. Judgment for the plaintiff was affirmed. The defendant in that case produced a witness who gave testimony of the negligence of defendant's agents which was not within the issue of negligence as alleged in the complaint. No objection was made to such evidence. The Court was not asked to strike such evidence. It was received and considered the same as other testimony. The Court in ruling held that Rule 15(b) of the Federal Rules of Civil Procedure provides that when issues are not

raised by the pleadings but are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised by the pleadings, and that the pleadings may be amended to conform thereto. The Court further held that the Courts of New Mexico had held that where a material fact omitted from the pleadings is litigated without objection as if said fact had been put in issue by the pleadings, it is the duty of the trial Court to amend the complaint in aid of the judgment so as to allege the omitted fact and that likewise the Federal Courts have held that where evidence was received without objection, the issue raised thereby was before the Court for determination. Defendant contended in that case that since the plaintiff's cause of action was predicated solely on the defendant's negligence in operating a dangerous truck on the highway and did not include any claim of negligence in operation of the truck by its employees, that it was error of the Court to instruct on "law of the road". The Court said that it followed from what had previously been said in the opinion that evidence of negligence received in the testimony of defendant's witness became a part of the case and that thus the trial Court was required to give the challenged instruction.

The case of *Haskins v. Roseberry,* 119 Fed. (2d) 803, was decided by the Court of Appeals for the Ninth Circuit in the year 1941. In that case the plaintiff sued to quiet title to certain mining ground in the State of Nevada. Judgment in the trial Court was for the defendant. The defendant in that case

claimed that the statute of limitations barred the action. The plaintiff claimed that the question as to the statute of limitations was not before the Court because it had not been pleaded in that Rule 8(c) of the Federal Rules of Civil Procedure, requires an affirmative plea as to the statute of limitations. The Court held that it was unnecessary to decide as to whether the statute of limitations should have been pleaded and cited Rule 15(b) of the Federal Rules of Civil Procedure.

The case of *Vernon Lumber Company v. Harcen Const. Co.,* 155 Fed. (2d) 348, was decided by the Court of Appeals for the Second Circuit in the year 1946. In that case there was a suit by the plaintiff and a counterclaim by the defendant. Judgment was given to both parties on their respective claims. On appeal the judgment of the lower Court was reversed. Plaintiff challenged the award of damages on the counterclaim on the theory that there had been a waiver of non-delivery. The defendant on the other hand asserted that such waiver could not be asserted because it had not been pleaded as an affirmative defense. The Court held that it was not necessary to pass upon the issue of technical pleading since the evidence bearing upon the waiver issue was freely received and considered and hence it was before the District Court as it was before the Court of Appeals on appeal, citing Rule 15 (b) of the Federal Rules of Civil Procedure.

The case of *Scott v. Baltimore and O. R. Co.,* 151 Fed. (2d) 61 was decided in the year 1945 by the

Court of Appeals for the Third Circuit. This was a suit under the Federal Employees' Liability Act for damages for personal injuries. The defendant claimed that the boiler inspection act was not pleaded but was used as the basis for liability of the defendant. The defendant did not object that evidence offered concerning a defective "throttle dog" took it by surprise. The Court in its opinion used the following language:

> "perhaps the shortest and most conclusive answer to make to defendant's contention in that respect is that the present rule (15(b)) permits plaintiff to change his position in this way and that the citation of state cases is irrelevant. We may assume arguendo, that plaintiff started his action on one theory which his proof did not support. Then the proof, we may assume, sustained recovery on another ground. It is true the pleadings could then be amended to conform to the proof, but obviously this would give no satisfaction to the defendant. The only injustice to defendant in such situation is when he is compelled to go on with the trial and meet a new point which is a surprise to him and on which he has no opportunity to prepare. This situation is not claimed by defendant to exist here."

Judgment for the plaintiff was affirmed.

The case of *Atchison, T. & S. F. Ry. Co. v. Judson Co.,* 49 Fed. Sup. 789 was decided by the District Court for the Southern District of California in the year of 1943. In that case the shipper maintained that the pleadings were not broad enough to permit evidence of collusion. The Court held as follows:

> "When the evidence was offered, shipper did not claim surprise or ask for continuance to meet this issue. Counsel tried this case on the theory that the said evidence was admissible and it was evident that counsel was fully prepared. Under such circumstances, any error in this respect would be harmless (citing Rule 61 of the Federal Rules of Civil Procedure) and the pleadings could be amended even after judgment to conform to the evidence (citing Rule 15(b)). Rule 54(c) requires this Court to render relief to the party entitled to the same and it would be absolutely contrary to the spirit of said rules for this court to permit a technicality to preclude the decision on the merits."

The case of *Shapiro v. Yellow Cab Co.,* 79 Fed. Sup. 348, was decided by the District Court for the Eastern District of Pennsylvania in the year 1948. A taxi driver for the defendant company had transported a partially paralyzed passenger to the railroad station and stopped short of the loading platform near a hole in the street. The plaintiff stepped out of the cab and fell into the hole. There was a judgment for the defendant and the plaintiff moved for a new trial. The motion for a new trial was granted by the Court. The motion was on the ground that the Court had instructed the jury that it could not consider certain facts which appeared from the evidence. In the case it appeared that plaintiff's complaint was limited to an allegation of negligence concerning the allowance of the hole in question. Evidence was produced either by the plaintiff without objection or by the defendant from which the jury

could have found that the defendant was negligent and that such negligence was the proximate cause of plaintiff's injury. The Court in its opinion used the following language:

> "In accordance with Rule 15(b) issues of fact raised by the evidence although not raised by the pleadings should have been treated as though raised by the pleadings."

The Court ruled that the jury should have been allowed to consider all of the evidence and reach its verdict and that the Court had unduly restricted the jury.

We believe, under general law and especially under the practice existing in the Territory of Alaska at the time of the trial under the Federal Rules of Civil Procedure, that the Court committed no error in instructing the jury on the theory of contributory negligence even though no plea had been made in the answers to that effect. We further submit that in any event under Rule 61 of such rules the appellant is not entitled to a reversal of the judgment in the instant case for the reason that no showing has been made by appellant that any error was committed by the District Court or that any error committed by such Court was prejudicial in any way to the appellant. Appellant further submits that no showing of any kind has been made or argument advanced that anything done by the trial Court affected the substantial rights of appellant. The record shows conclusively that evidence was introduced by the plaintiff from which the jury very properly might

have found that the plaintiff was contributorily negligent. The record shows that the plaintiff herself asked for an instruction on contributory negligence and excepted to the refusal of the Court to give such requested instruction. There is no showing at all that plaintiff was surprised by the evidence introduced or by the instruction given. On the contrary, it appears clear from the record that the trial Court should have granted defendants' motions for directed verdict or for judgment.

As previously pointed out appellees believe that this matter can be disposed of without considering the ruling of the trial Court on defendants' motions for permission to amend their answers to raise the issue of contributory negligence. It is probable that in view of the provisions of Rule 15(b) and the decisions decided under such rule a formal amendment was not necessary. However, defendants desired that nothing be left undone which should have been done. It appears clear to appellees that under Rule 15(b) and the cases previously cited that if amendment was necessary that the Court was entitled to allow such amendment even after verdict and that the action of the trial Court was proper in granting the motions of the defendants in that respect.

Appellant has shown nothing to indicate that she was prejudiced in any manner whatsoever by defendants' failure to plead contributory negligence in the first place or by the Court's ruling allowing an amendment to raise such plea to conform to the proof and to formally raise the issues which had been raised by

plaintiff's own evidence and tried by consent of the parties.

The issue of contributory negligence was properly before the jury and to reverse the judgment on appellant's plea that contributory negligence was not raised by the pleadings would be to substitute form for substance and would be in direct violation of the letter and of the spirit of the Federal Rules of Civil Procedure.

Dated, Anchorage, Alaska,
August 15, 1952.

Respectfully submitted,
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